HEALTH REVIEW COMMISSION

JANUARY 1983
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No. 1

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The following case was Directed for Review during the month of Jan

Secretary of Labor on behalf of Phillip Cameron v. Consolidation C
Docket No. WEVA 82-190-D. (Judge Merlin, December 13, 1982)

Review was Denied in the following cases during the month of Janua

Secretary of Labor, MSHA v. Consolidation Coal Company, Docket Nos
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Secretary of Labor, MSHA v. Allied Chemical Corporation, Docket No
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Secretary of Labor, MSHA v. Consolidation Coal Company, Docket Nos
PENN 82-66-R, 82-109, 82-184. (Judge Broderick, December 6, 1982)

Secretary of Labor, MSHA v. Southwestern Illinois Coal Corporation
LAKE 82-38. (Interlocutory Review of December 16, 1982 Order of Ju

William Haro v. Magma Copper Company, Docket No. WEST 81-365-DM. (
November 1, 1982)

v.	:	Docket No. WEST 81-109-DM
	:	
IMCO SERVICES	:	

ORDER

On December 15, 1982, the Commission issued its decision in thi case affirming the administrative law judge's dismissal of Joseph W. Herman's discrimination complaint as untimely filed under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). On January 18, 1983, we received a document filed by Mr. Herman. We construe the document to be a request for reconsider tion of the Commission's decision. 29 C.F.R. § 2700.75. We find no merit in the request and, accordingly, it is denied.

We note Mr. Herman's request for "an appeal ... to the next judicial court available to me." We can take no action regarding this request. If complainant desires to appeal the Commission's decision to a United States Court of Appeals, the appropriate procedures set forth in section 106(a)(1) of the Act (30 U.S.C. § 816(a)(1)) and the Federal Rules of Appellate Procedure must be followed by him.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

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ECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v. : Docket No. KENT 81-136

NITED STATES STEEL CORPORATION

DECISION

This civil penalty proceeding arises under the Federal Mine Safet nd Health Act of 1977, 30 U.S.C. § 801 et seq. (1976 & Supp. V 1981), nd involves the interpretation of the surface coal standard, 30 C.F.R 77.1605(k). The standard states that "[b]erms or guards shall be rovided on the outer bank of elevated roadways." 1/ In granting sum- ary decision for United States Steel Corporation, the administrative aw judge concluded that the standard was unconstitutionally vague and herefore, unenforceable. 2/ For the reasons discussed below, we everse and remand for further proceedings.

Following an inspection of U.S. Steel's No. 32 Mine in Lynch, entucky, an MSHA inspector issued a citation alleging that the compan iolated section 77.1605(k) by failing to install appropriate berms or uards at three areas along a mine roadway. At one location, the insp or observed a guard dislodged for a distance of 29 feet. At one of he other two cited locations there was a berm 6 to 8 inches high and 2 feet long, and at the remaining location there was a berm 16 inches igh and 29 feet long. The inspector noted on the citation that the eight of these berms was less than 22 inches, the axle height of what he inspector believed was the largest vehicle using the roadway, a ettibone tractor. The relevant MSHA inspector's manual contains a olicy providing that under section 77.1605(k) berma "shall be at

/ "Berm" is defined in 30 C.F.R. § 77.2(d) as "a pile or mound of aterial capable of restraining a vehicle."

/ The judge's decision is reported at 4 FMSHRC 563 (April 1982)(ALJ

At the hearing before the [illegible] filed a joint stipulation in which they agreed that the citati that there were berms along the roadway except where the guard dislodged. U.S. Steel claimed in the stipulation that it was the guard when the citation wss issued. The parties filed cr for summary decision.

The judge concluded that "the language of section 77.160 is so vague and ambiguous as to render [the standard] unenfor 4 FMSHRC at 571. The judge also held that the Surface Manual on mid-axle height, which he found formed the basis of the ci not part of the standard and could not be applied as though i 4 FMSHRC at 570-71. The judge accordingly vacated the citati directed review sua sponte. 30 U.S.C. § 813(d)(2)(B). The i us are the constitutional vslidity of the standard and the ju ment of the MSHA Surface Manual guidelines.

We first address the question of whether section 77.1605 unconstitutionally vague. 4/ This standard is not detailed b have observed previously in a similar context, "[m]any standa be 'simple and brief in order to be broadly adaptable to myri circumstances.'" Alabama By-Products Corp., infra, slip op. quoting from Kerr-McGee Corp., 3 FMSHRC 2496, 2497 (November Nevertheless, such broad standards must afford reasonable not is required or proscribed. As we stated in Alabama By-Produc

> In order to pass constitutional muster, a statute o standard adopted thereunder cannot be "so incomplet vague, indefinite or uncertain that men of common intelligence must necessarily guess at its meaning

3/ MSHA, Coal Mine Health snd Safety Inspection Manual For Mines and Surface Work Areas of Underground Coal Mines, at I ("the Surface Manual"). The Surface Manual is Chapter III o Inspection and Investigation Manual, Federal Mine Safety and 1977 (1978)("the Inspection Manual"). The "Introduction," a that the primary purpose of the Inspection Manual is to prov inspection personnel with "definite guidelines" to aid them duties.

4/ We reject the Secretary's contention that the Commissio authority to pass upon the constitutional soundness of this The standard was promulgated under the 1969 Coal Act, snd we previously that chellenges to the validity of a Coal Act sta

ip op. at 2. We resolved a vagueness challenge in Alabama By-Produc interpreting the standard at issue in light of a "reasonably pruden rson" test (slip op. at 2-3), and we adopt the same approach in the esent case.

We hold that the adequacy of a berm or guard under section .1605(k) is to be measured against the standard of whether the rm or guard is one a reasonably prudent person familiar with all e facts, including those peculiar to the mining industry, would ve constructed to provide the protection intended by the standard. e Alabama By-Products, supra. See also Voegele Company, Inc. v. HRC, 625 F.2d 1075, 1077-79 (3rd Cir. 1980). 5/ The definition of rm in section 77.2(d) makes clear that the standard's protective rpose is the provision of berms and, by implication, guards that e "capable of restraining a vehicle." 6/

Under our interpretation of the standard, the adequacy of an oper r's berms or guards should thus be evaluated in each case by referen an objective standard of a reasonably prudent person familiar with mining industry and in the context of the preventive purpose of th atute. When alleging a violation of the standard, the Secretary is quired to present evidence showing that the operator's berms or guar not measure up to the kind that a reasonably prudent person would ovide under the circumstances. This evidence could include accepted fety standards in the field of road construction, considerations uni the mining industry, and the circumstances at the operator's mine. rious construction factors could bear upon what a reasonable person ld do, such as the condition of the roadway in issue, the roadway's evation and angle of incline, and the amount, type, and size of traf ing the roadway. In sum, we hold that section 77.1605(k), as constr rein, is not unconstitutionally vague and that it is therefore an forceable standard. 7/

On review the Secretary now proposes a similar test for judging t equacy of a berm or guard. Brief for Sec'y at 14-16.

"Restraining a vehicle" does not mean, as U.S. Steel suggests, solute prevention of overtravel by all vehicles under all circum- ances. Given the heavy weights and large sizes of many mine vehicle at would probably be an unattainable regulatory goal. Rather, the andard requires reasonable control and guidance of vehicular motion.

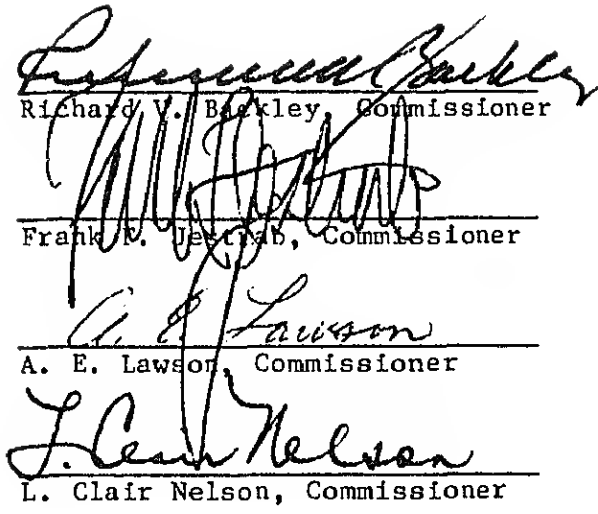
The Secretary is privileged under the Mine Act to write a more ecific berm standard setting forth more detailed specifications for nstructio of safe berms a g a d .

standards. See Alabama By-Products, supra, slip op. at 5; Kin
Coal Co., Inc., 3 FMSHRC 1417, 1419-23 (June 1981); Old Ben Co
2 FMSHRC 2806, 2809 (October 1980). Reliance on the mid-axle
without more, does not necessarily establish the berm or guard
reasonably prudent person would have constructed under the cir
If the Secretary believes that a berm of mid-axle height is ir
a reasonable person would provide in a particular case, the Se
must prove that by a preponderance of credible evidence. We t
in result the judge's determination that the Secretary was not
to summary decision on the basis of his internal guideline alo

Under our rules, a motion for summary decision may be gra
if the entire record shows no genuine issue of material fact a
moving party is entitled to a decision as a matter of law. 29
§ 2700.64(b). Having found the standard invalid, the judge di
determine all factual issues necessary to a decision in this c
have concluded above that the standard is valid, and our revie
record indicates to us that material factual issues remain to
before it can be determined whether a violation occurred.

To prove the allegation of "inadequate" berms requires ev
to what type of berm or guard a reasonably prudent person woul
under the circumstances. With respect to the area where the p
dislodged, a prima facie case of violation may have been estal
the judge must make findings as to whether the guard was actua
and whether U.S. Steel established a valid defense in its cla
guard was being replaced. 8/ Without this kind of evidence an
findings, the entry of summary decision was inappropriate. Ac
we remand this proceeding in order to afford the parties the c
to present any additional evidence and argument with respect t
violation in accordance with the principles set forth above.

8/ We express no view at this time on the viability of U.S.
asserted defense to this aspect of the citation.



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Falls Church, Virginia 22041

v. : Docket No. WEST 81-365-DM
:
MAGMA COPPER COMPANY :

ORDER

William A. Haro has petitioned for discretionary review pro se a decision of an administrative law judge issued on November 1, 198 Magma Copper has filed a motion requesting that the petition be dis missed as untimely. For the reasons that follow, the petition is dismissed as untimely.

The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 80 seq., provides that "any person adversely affected or aggrieved by decision of an administrative law judge, may file and serve a petit for discretionary review by the Commission of such decision within days after the issuance of such decision." 30 U.S.C. § 823(d)(2)(A (emphasis added). Rules 5(d) and 70(a) of the Commission's rules o procedure provide that "filing of a petition for discretionary revi effective only upon receipt." 29 C.F.R. §§ 2700.5(d), 70(a). The decision of the administrative law judge becomes the final decision the Commission 40 days after its issuance unless the Commission has directed review of the decision during that period. 30 U.S.C. § 82

The administrative law judge's decision in this case was issue November 1, 1982. The fortieth day following the issuance of the j decision was December 11, 1982. The petition for discretionary rev was not mailed until December 22, 1982. It was not received, and t fore filed, at the Commission until December 27, 1982, fifty-six da after the issuance of the judge's decision. Accordingly, the petit for discretionary review was not filed until after the decision of judge became a final order of the Commission by operation of law. 30 U.S.C. § 823(d)(1).

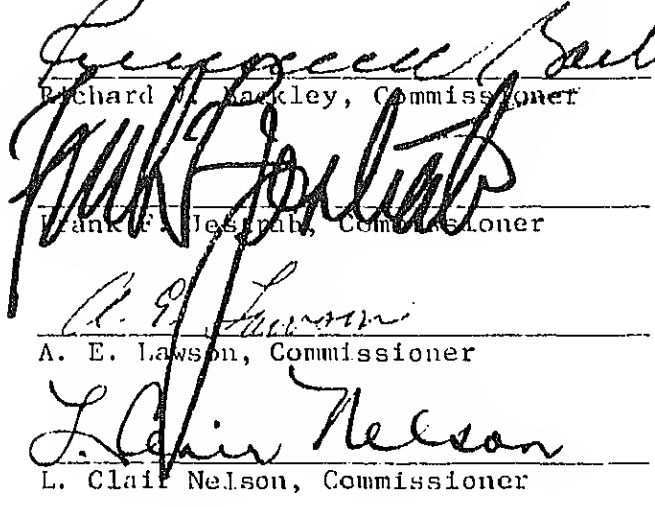
In the petition, Haro states that he first learned of the judg decision on December 6, 1982, and that the attorney who represented in the proceedings before the judge can confirm the date of his not cation of the judge's decision. Haro also states that the attorney not petition for review of the judge's decision because of a potent conflict of interest with Magma Copper Company. We construe these

of the petition against the standards set forth in Fed. R. Civ. P. 60(b)(1). 1/ Boone v. Rebel Coal Company, 4 FMSHRC 1232 (1982). Moore's Federal Practice § 60.22[2]; 11 Wright & Miller, Federal Practice and Procedure § 2858. Even if Haro's assertion that he f learned of the decision on December 6 is accepted as fact, Haro ha made any representations that his late receipt of the decision was to factors outside of his control or that of his attorney. The po conflict of interest that allegedly prevented Haro's attorney, who represented him at the hearing and filed a post-hearing brief on h behalf, from filing a petition with the Commission is not explaine view of the extraordinary nature of reopening final judgments, lac sufficient information substantiating a request for relief can be to such claims. 7 Moore's at § 60.22[2], p. 257. Moreover, Haro more than two weeks after December 6 to prepare and mail a petitio paragraphs in length. This delay does not demonstrate diligence u the circumstances. Haro has had two previous cases before the Com and should be familiar with its procedures. 2/

1/ Fed. R. Civ. P. 60(b)(1) provides:

> On motion and upon such terms as are just, the court may reli party or his legal representative from a final judgment, orde proceeding for the following reasons: (1) mistake, inadverten surprise, or excusable neglect....

2/ The present situation is not analogous to that involved in Du Corp. v. Donovan & FMSHRC, 650 F.2d 1051 (9th Cir. 1981). In Duva operator's petition for discretionary review was filed on the thir first day after the issuance of the administrative law judge's dec Thus, although the petition for review was untimely filed under th and the Commission's rules, the judge's decision had not become a order of the Commission because 40 days had not passed since its i 30 U.S.C. § 823(d)(1). In a Duval situation, the inquiry is wheth good cause for the untimely filing has been established. Valley R & Sand Corp., WEST 80-3-M (March 29, 1982); McCoy v. Cresent Coal C FMSHRC 1202 (June 1980). In the present case, however, the judge' decision became a final order of the Commission and, therefore, th request for relief is appropriately addressed under Fed. R. Civ. P. 60(b).



Richard V. Backley, Commissioner

Frank E. Jesinghaus, Commissioner

A. E. Lawson, Commissioner

L. Clair Nelson, Commissioner

This civil penalty proceeding arises under the Federal Mine Safety
Health Act of 1977, 30 U.S.C. § 801 et seq. (1976 & Supp. V 1981),
nvolves the interpretation and application of 30 C.F.R. § 56.4-35.
ited standard provides:

> Mandatory. Before any heat is applied to pipelines or containers which have contained flammable or combustible substances, they shall be drained, ventilated, thoroughly cleaned of residual substances and filled with either an inert gas or, where compatible, filled with water.

administrative law judge concluded that A. H. Smith Stone Company
ith") violated the standard and assessed a $1,000 penalty. 1/ For
ollowing reasons, we affirm the judge's decision.

On November 24, 1980, an accident occurred at Smith's Culpeper,
inia crushed stone operation, when a miner attempted to cut with a
ng torch a used 55-gallon oil drum. The drum exploded and the
oyee was critically injured. After an investigation of the accident
issued a citation charging a violation of the standard for a
ure to have the drum purged of flammable substances before heat was
ed to it.

Used drums that had contained flammable substances, such as fuel
lubricants, or antifreeze, were customarily stored at Smith's
eper plant behind a company trailer. The used drums were return-
for credit towards purchase of full barrels, and were picked up at
plant for that purpose by the distributor. Some drums were kept at
plant for re-use as trash barrels or as storage drums for fuel or
lcants. When a drum was to be re-used as a trash receptacle, Smith
l have its employees cut off the drum top with a torch on company

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The judge's decision is reported at 3 FMSHRC 2927 (December 1981) (A

the employee did not explain the reason for his request, the s
intendent assumed that he wanted the drum for his personal use
at 2931-32; Tr. 83-86. 3/ The superintendent gave the employee
to take the drum. The employee then obtained from a fellow mi
torch for cutting the drum, but he did not remove the plug or
drum before using the torch. The drum exploded when he applied
torch to it and he received fatal injuries. A subsequent inves
revealed that a residue of petroleum distillate inside the drum
ignited by the heat of the torch.

The judge based his conclusion that Smith violated section
on the evidence that "[the employee] applied a torch to a conta
which had contained combustible or flammable oil without draini
ventilating, and cleaning the barrel." 3 FMSHRC at 2932. In a
the penalty, the judge also determined that Smith was negligent
judge found that Smith knew or should have known that it was po
the miner would cut the oil drum on company premises. 3 FMSHRC
The judge emphasized that Smith permitted its employees to take
drums for personal use, and also at times instructed employees
drums on company property for such company uses as making trash
Id. The judge concluded that "[w]hile [Smith] did attempt to i
the employees as to the proper procedure for purging drums, man
could have been more diligent in its attempts to insure that all
were properly ventilated and cleaned." Id.

On review Smith, proceeding pro se, commingles liability an
negligence arguments. Smith does not deny that the miner cut th
without first purging it. The operator contends, however, that
neither liable nor negligent in connection with the incident bec
had previously instructed the employee in proper purging procedu
did not specifically authorize him to cut the drum on company pr
and could not have foreseen that he would do so. We are not per

2/ The plant superintendent testified that the plugs were not
(a procedure that would have allowed some ventilation of the drum
because the distributor had requested that the plugs not be remov
drums being returned for credit.

3/ Testimony at the hearing indicated that the miner intended t
the drum at his home as a receptacle for draining oil. Tr. 38, 5

nnot be squared with either the broad and mandatory language of the
andard or the liability without fault structure of the Mine Act.
e Southern Ohio Coal Co., 4 FMSHRC 1459, 1462-64 (August 1982).
e also Sewell Coal Co. v. FMSHRC, 686 F.2d 1066, 1071 (4th Cir.
82); Allied Products Co. v. FMSHRC, 666 F.2d 890, 893-94 (5th Cir.
82). We therefore affirm the judge's conclusion that a violation
the standard occurred.

Regarding negligence, section 110(i) of the Mine Act requires th
assessing penalties the Commission must consider, among other crit
hether the operator was negligent." 30 U.S.C. § 820(i). Each mand
andard thus carries with it an accompanying duty of care to avoid v
tions of the standard, and an operator's failure to meet the approp
ty can lead to a finding of negligence if a violation of the standa
curs. The fact that a violation was committed by a non-supervisory
ployee does not necessarily shield an operator from being deemed
gligent. In this type of case, we look to such considerations as
e foreseeability of the miner's conduct, the risks involved, and th
erator's supervising, training, and disciplining of its employees t
event violations of the standard in issue. Southern Ohio Coal Co.,
FMSHRC at 1463-64. See also Nacco Mining Co., 3 FMSHRC at 848, 850
pril 1981)(construing the analogous penalty provision in 1969 Coal
t where a foreman committed a violation). In light of these genera
inciples, we affirm the judge's conclusion that the employee's cond
s foreseeable and that Smith did not meet its duty of care under th
rcumstances.

An employee's cutting of a used drum with a torch at Smith's min
eration was not an uncommon occurrence. Smith's employees performe
at task to make barrels for storing or burning trash at the plant.
e employee in question had previously cut drums on company premises
ch business purposes, and that function was part of his job descrip
FMSHRC at 2931; Tr. 76, 83, 85-86. As the judge found, Smith was a
iberal" in allowing its employees to take used drums for their own
FMSHRC at 2932), and the same employee had been given drums in the
r his personal use. Tr. 55-56, 85. Cutting used drums to make rec
cles was a common use of the drums. We thus affirm the judge's fin
at on the day of the accident it was reasonably foreseeable that th
ployee might cut the drum on company property.

The used drum taken by the employee had not been purged nor had
s plug been removed. A plugged, unpurged drum that has contained a
ammable substance is a highly dangerous instrumentality given an
nition source and the consequent possibility of an explosion if hea
applied. An operator must address a situation presenting a potent
urce of explosion as here with a degree of care commensurate with

maintain control over unpurged drums. For example, Smith could
marked unpurged drums, "purge before cutting"; it could have pos
the storage area a warning sign reminding employees of appropria
purging procedures; cutting could have been permitted only under
supervision in designated areas. The record does not show that
took any such precautions. Indeed, the superintendent did not
company instructions on purging when he let the employee take th
unpurged drum even though, as we have concluded, it was foreseeal
that the employee might cut it with a torch on company premises.

Thus, we agree in result with the judge that Smith was negl
in not discharging an appropriate duty of care under the circums
of this case. In reaching this conclusion, however, we do not e
the judge's reasoning that an operator in Smith's position shoul
purged all containers that held flammable substances before stor
Although this may indeed be a safe practice to follow, the stand
requires purging before heat is applied. Thus, in this case Smi
of care could have been met by something more than mere reliance
oral instruction, but less than the across-the-board purging pro
suggested by the judge. 5/

4/ Although the superintendent denied authorizing the employee
cut the drum on company property, he did not forbid any cutting
indeed, testified that he would have given permission for cuttin
had the employee requested it. 3 FMSHRC at 2933; Tr. 87. This
testimony reveals a managerial disposition to allow cutting for
personal purposes and underscores our conclusion that insufficie
care was taken when personal use of the drum was approved.

5/ We also reject two additional arguments posed by Smith. Sm
complains that the transcript of the hearing was not made availa
it. At the hearing, however, the judge specifically stated in r
to Smith's request that transcripts could be obtained from the r
Tr. 133. Smith also complains of the Secretary's change of posi
from not pleading negligence to alleging negligence just before
trial. Smith fails to show how this pre-trial change of theory
prejudicial to it. Smith was informed prior to trial that the S
would attempt to prove negligence on the basis of new evidence.
8-9. A shifting of legal theories based on evidence revealed th
discovery or other sources after the initial pleadings is certai

(Footnote continued

Richard V. Backley, Commissioner

Frank F. McAtee, Commissioner

A. E. Lawson, Commissioner

L. Clair Nelson, Commissioner

5/ continued

common. The Secretary orally sought a continuance to prepare his gligence claim, and Smith did not oppose the motion. Tr. 8-12. Smit not specifically explain to the judge how it would be legally pre- diced by the change of theory, did not state that it would need extra ne to prepare any additional defense, and did not attempt to show bad ith or dilatory motive on the Secretary's part. Tr. 8-15. Finally, no time during the administrative hearing did Smith object to the roduction of this evidence on the grounds that it was outside the ope of the pleadings. We find Smith's conduct tantamount to consent trial of the negligence issue. See in general, Mineral Industries l Heavy Construction Group v. OSHRC, 639 F.2d 1289, 1293-94 (5th Cir. 81).

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Administrative Law Judge Decisions

JIM WALTER RESOURCES, INC., Contestant	:	Application for Revi
v.	:	Docket No. SE 82-34-R Order No. 0757586; 2
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	No. 7 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proce Docket No. SE 82-53 A/O No. 01-01401-030
v.	:	No. 7 Mine
JIM WALTER RESOURCES, INC., Respondent	:	

DECISION

Appearances: Robert W. Pollard, Esq., Birmingham, Alabama, a
Reynolds, Esq., Tampa, Florida, for Jim Walter
Frederick W. Moncrief, Esq., Office of the Sol
Department of Labor, Arlington, Virginia, for
of Labor.

Before: Administrative Law Judge Broderick

STATEMENT OF THE CASE

On February 15, 1982, a fatal roof fall occurred at the
lter Resources (the operator). Following an investigat
ary 16, 1982, MSHA on February 19, 1982, issued an im
aval under section 107(a) of the Federal Mine Safety
1 U.S.C. § 817(a) (the Act). The order also allege
the order was proscribed by the approved roof co
olated 30 C.F.R. § 75.200.

or, was called as a witness by the operator and Charles J. Hager, I
derick Carr also testified on the operator's behalf. A civil penal
s subsequently filed. Because the civil penalty proceeding and the
proceeding involve the same order, and similar issues of fact and l
e hereby CONSOLIDATED.

th parties have filed posthearing briefs. On the basis of the evic
ced at the hearing and considering the contentions of the parties,
e following decision.

S OF FACT

At all times pertinent to these proceedings, Jim Walter was the c
rator of the No. 7 Mine in Tuscaloosa County, Alabama.

On February 15, 1982, a fatal roof fall occurred in the subject m
face area of No. 4 entry, No. 1 section.

An order of withdrawal was issued on February 19, 1982, which all
e following condition or practice occurring on February 15, 1982,
ated an imminent danger and a violation of the approved roof contro

A fatal roof fall accident occurred on the No. 1 section at
e face of the No. 4 entry and based on evidence and testimony,
e victim was installing a support to install line curtain
d while installing the support the victim was standing more
an 5 feet inby the permanent roof supports and more than 5 feet
om the rib or face. The approved roof control plan requires
at workmen shall be within 5 feet of the face or rib or
manent supports while extending line curtain.

On February 19, 1982, a modification of the order of withdrawal w
which permitted mining operations to continue "while the following
e of roof supports are installed to advance the line curtain and to
MSHA personnel to evaluate this system:" A minimum of two tempora
s are required when any work is performed inby the last row of
nt supports. One must be a jack or timber set no more than 5 feet
and the other the miner head placed against the top. These suppo
e not more than 4 feet apart and not more than 5 feet inby the las
anent supports or last temporary support. Any work done inby the l
roof supports shall be done between such supports and the nearest

supports to reset the jack and reattach the line curtain to i
on the left side (the "wide side") of the curtain after exami
visually and sounding it with a hammer. The miner operator w
jack to the right side of it and the helper began tightening
standing on the left side. A roof rock fell brushing the min
knocking him back against the right rib. It fell on top of t
killed him. The victim was approximately 7-1/2 feet from the
5 feet inby the last standing roof jack. He was 10 feet inby
permanent roof supports.

7. The approved roof control plan in effect for the sub
time of the fatality contained the following safety precautio

"4. When testing roof or installing supports in th
area, the workmen shall be within 5 feet (less if indica
sketch) of a temporary or permanent support."

"5. When it is necessary to perform any work such
line curtains or other ventilating devices inby the roof
to make methane tests inby the roof bolts, a minimum of
temporary supports shall be installed. This minimum is
only if they are within 5 feet of the face or rib and th
done between such supports and the nearest face or rib."

8. The approved ventilation plan in effect for the subj
time of the fatality required that a line curtain be maintain
10 feet of the face. The mine liberated considerable methane
an exceptionally high velocity and quantity of air to ventila
Because of this it was necessary to fasten the curtain to the
and the bottom of the temporary support.

9. A fatal roof fall occurred at the No. 3 Mine of Jim
November 21, 1979, under circumstances similar to those invol
A citation was issued in the prior case charging a violation
§ 75.200 because of failure to comply with the approved roof
citation was contested before the Commission. After a hearin
Laurenson found that paragraph 4 of the roof control plan (wh
to the same paragraph in the roof control plan applicable in
require that miners travel between the temporary support and
when setting supports to extend the line curtain. The Judge
of contest and vacated the citation. Jim Walters v. Secretar
(1980).

11. The Secretary did not petition for review of Judge Laurenson's cision.

12. Subsequent to Judge Laurenson's decision, there were discussio tween MSHA officials and the operator attempting to clarify the requir paragraphs 4 and 5 of the safety precautions in the roof control plan changes were agreed upon.

13. Subsequent to the fatal roof fall involved herein, there have scussions between MSHA and the operator relating to paragraphs 4 and 5 e precautions in the approved roof control plan. Specifically, a rewr the above paragraphs permitting the use of the miner head as roof sup s been discussed, but the plan has not yet been modified.

ATUTORY PROVISION

Section 3(j) of the Act defines an imminent danger as "the existenc ndition or practice in a coal or other mine which could reasonably be cause death or serious physical harm before such condition or practic abated."

GULATORY PROVISION

30 C.F.R. § 75.200 provides as follows:

> Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form on or before May 29, 1970. The plan shall show the type of support and spacing approved by the Secretary. Such plan shall be reviewed periodically, at least every 6 months by the Secretary, taking into consideration any falls of roof or ribs or inadequately of support of roof or ribs. No person shall proceed beyond the last permanent support unless adequate temporary support is provided or unless such temporary support is not required under the approved roof control plan and the absence of such support will not pose a hazard to the miners. A copy of the plan shall be furnished to the Secretary or his authorized representative and shall be available to the miners and their representatives.

existed in the subje
danger.

2. Whether a violation of the approved roof control pla
of 30 C.F.R. § 75.200 was established.

(a) Whether the Secretary is estopped or barred fr
asserting that the condition is a violation of the stand
reason of the decision in Jim Walters Resources Inc., 2
3276 (1980).

3. If a violation of the mandatory standard was establi
appropriate penalty therefor?

CONCLUSIONS OF LAW

Jim Walter Resources, Inc. was subject to the provision
Mine Safety and Health Act in the operation of the No. 7 Min
pertinent hereto, and the undersigned Administrative Law Jud
over the parties and subject matter of this proceeding.

IMMINENT DANGER

The existence of an imminent danger and the propriety o
order of withdrawal do not depend upon the existence of a vi
mandatory standard. Freeman Coal Mining Corporation, 2 IBMA
danger under the Act is not limited to situations involving
but includes conditions that "would induce a reasonable man
if normal operations . . . proceeded, it is at least just as
that the feared accident or disaster would occur before elim
danger." Old Ben Coal Corp. v. Interior Bd. of Mine Op. App
(7th Cir. 1975), quoting Freeman Coal Mining Co. v. Interior
504 F.2d 741, 743 (7th Cir. 1974).

The order under review here alleges that a miner was st
5 feet inby the permanent roof supports and more than 5 feet
face, and the evidence introduced at the hearing establishes
facts (Finding of Fact No. 6). MSHA roof control specialis
this practice equivalent to travelling or working under unsu
therefore an imminent danger. His opinion was based in par
which occurred here and the one which occurred in Jim Walte
referred to in Finding of Fact No. 9.

lso present a hazard in no way negates the danger posed by unsupport
The fact that the condition or practice was permitted by the roof
(if it was) does not negate the existence of an imminent danger. Th
clude that working or travelling more than 5 feet inby permanent sup
ore than 5 feet from a rib or face is an imminent danger and the wit
was properly issued.

he operator argues that the practice cannot constitute an imminent
it has been followed for many years in the subject mine and in othe
in the district. Non sequitur. The fact that an imminently danger
tion has existed and been tolerated is no argument for its continuan
perator also argues that the 3 day delay between the investigation a
ssuance of the order indicates that the condition was not imminently
rous. MSHA's explanation for the time period is that there were dis
with State officials, Mine Management and Union representatives con
ractice, and that when Mine Management stated that the practice woul
nue, it was decided to issue the withdrawal order. Clearly, the wit
should have been issued immediately after the investigation, but th
y establishes that the condition or practice was not imminently dang

UDICATA/COLLATERAL ESTOPPEL

Judge Laurenson's decision, which involved, as the Solicitor states,
ually identical circumstances" to those in the case before me, held
raph 4 of the precautions in the roof control plan governs when roof
rts are being installed to extend the line curtains. Since paragrap
not require that miners stay within 5 feet of a rib or face, he vaca
itation and dismissed the civil penalty proposal. Judge Laurenson's
ion followed a formal adversary hearing; both parties filed posthear
s. The government did not file a petition for discretionary review
ommission. Counsel states "that some consideration was given to whe
t to file a [petition for review]" but in any event, it was not file
fore, Judge Laurenson's decision was the final decision of the Commi

Following that decision MSHA could have petitioned for review (and
led to the Court of Appeals if the petition was denied) or it could
eded to modify the roof control plan. It did neither, but rather ch
nore the decision and yet continue to enforce its interpretation of
control plan which had been rejected. The parties to the two proce
he same, the roof control plan has not been changed, the circumstanc
wo cases are "virtually identical." It would appear that if res jud
er applicable to administrative proceedings, it is applicable here.

justification for a second evidentiary hearing [illegible] already resolved as between the two parties.

See also Mitchell v. National Broadcasting Co., [illegible] 1977); Atlantic Richfield Company v. Federal Power Commission, 542 (T.E.C.A. 1977); Bowen v. United States, [illegible] Continental Can v. Marshall, 603 F.2d [illegible] Can case, the court held (594-5) that the test [illegible] the subsequent case is the same as that decided in the [illegible] issue was actually litigated; whether the [illegible] on the resolution of the issue; and whether the [illegible] Secretary asserts in his brief that Judge Parker [illegible] and refers to Commission Rule 71 which states that [illegible] judge is not a precedent. This rule has nothing to do with res judicata, but with stare decisis, a doctrine [illegible] following the tests in Continental Can that [illegible] res judicata and the Secretary is precluded [illegible] before me.

It is grossly unfair to assert, as the Secretary [illegible]

> "What is at stake, as these two cases [illegible] is human life. However well intentioned [illegible] in relying on the prior decision, the cost [illegible] life. Such a result is not to be tolerated [illegible] purpose of which is the preservation of life."

Judge Laurenson's decision was issued December 14, [illegible] involved herein occurred February 14, 1968. [illegible] appeal, he had ample opportunity to effect changes [illegible] He failed to do so.

Based upon the above findings of fact and conclusions of law, IT RDERED:

1. The withdrawal order issued under section 107 of the Act, as ithdrawal order is AFFIRMED.

2. The withdrawal order, insofar as it charges a violation of 7 75.200, is VACATED.

3. The penalty proceeding is DISMISSED.

James A. Broderick
James A. Broderick
Administrative Law Judge

stribution: By certified mail

obert W. Pollard, Esq., Post Office Box C-79, Birmingham, AL 35283

. Gerald Reynolds, Esq., 1500 N. Dale Mabry Highway, Tampa, FL 3360

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eorge D. Palmer, Esq., Associate Regional Solicitor, U.S. Department 929 9th Avenue South, Birmingham, AL 35256

SHANNOPIN MINING COMPANY, : Shannopin Mine
Respondent : Sol No. 12874

FURTHER FINDINGS OF FACT
AND
FINAL ORDER

On November 30, 1982, a decision was entered on the issue of section 105(c) of the Federal Mine Safety and Health Act of § 801, et seq. The decision deferred a final order pending su the parties as to the appropriate relief to be granted based o

FINAL ORDER

Having considered the parties' submissions with respect t order, and a post-decision motion by the United Mine Workers o intervene for the purpose of submitting a proposed order for r ORDERED:

1. The UMWA's motion to intervene is DENIED as being unt good cause on the merits.

2. The Secretary's proposed supplemental stipulations are hereby INCORPORATED as FURTHER FINDINGS OF FACT in this proceed

3. Based on the record as a whole, and on the statutory c assessing a civil penalty for a violation of the Act, Respondent civil penalty of $800 for its violation of section 105(c) of th the above-mentioned decision; Respondent shall pay such penalty within 30 days from the date of this Order.

4. Respondent shall make payment to George Mateleska in th $392.40, with interest at the rate of 12 percent per annum accru 1981, until paid, to compensate him for the 5 days lost pay incu of Respondent's unlawful suspension of him.

consecutive period of at least 60 days.

WILLIAM FAUVER, JUDGE

Distribution Certified Mail:

Covette Rooney, Esq., Office of the Solicitor, U.S. Department of Lab
Room 14480 Gateway Building, 3535 Market Street, Philadelphia, PA 191

Jane A. Lewis, Esq., Thorp., Reed & Armstrong, 2900 Grant Building, P
PA 15219

Mary Lu Jordan, Esq., United Mine Workers of America, 900 15th Street
Washington, DC 20005

Respondent : MD 80-156
:
: Churchrock Operations

DECISION

Appearances: Grant L. Foutz, Esq., Gallup, New Mexico, appeared
Complainant;
Lindsay Lovejoy, Esq., Stephenson, Carpenter, Crou
and Lea Brownfield, Esq., all of Santa Fe, New Mex
for Respondent.

STATEMENT OF THE CASE

The complaint filed herein alleges that Complainant was dis
March 26, 1980, from the position he held with Respondent, an a re
ity protected under the Federal Mine Safety and Health Act of 197
§ 801. Complainant filed a complaint of discrimination with MSHA
1980. MSHA denied the complaint by a letter dated January 6, 198
plaint was filed with the Review Commission on January 25, 1982.
notice, the case was heard in Gallup, New Mexico, on October 19,
Allen, Gilbert MacLellan, Robert Robb and Ron MacLellan were calle
by Complainant. No witnesses were called by Respondent. Both par
filed posthearing briefs with proposed findings of fact and conclu
Based on the entire record, and considering the contentions of the
make the following decision.

FINDINGS OF FACT

1. At all times pertinent to this proceeding, Respondent was
of the Northeast Church Rock Mine near Gallup, New Mexico.

a journeyman mechanic at the time of the hearing.

3. In 1977 and 1978, Complainant received very few complaints regar ety from those who worked under him--approximately 10 each year. In l h safety complaints went up to perhaps 10 each day. At least two empl t the company because they were concerned about safety. The alleged u itions included loose rock, cave-ins, and improper ventilation. Comp loyees were required to travel over muck piles and ground fall piles t equipment. A number of citations were issued by MSHA inspectors in 19 se conditions. Complainant reported these conditions to his supervisc the Safety Department "plenty of times."

4. On one occasion in April of 1979, a loader had been taken out of ice by Complainant's crew because it did not have brakes. The loader d-tagged." However, the production crew ignored the red tag and put t er in service. An MSHA inspector discovered that it had no brakes an ued a citation. Complainant was upset and voiced his feelings to his ervisors. In February, 1980, a haulage truck was taken out from the s though it had a faulty shift lever. An accident occurred when the t ed out of gear.

5. On many occasions, Complainant reported inadequate ventilation i s which caused dizzyness and disorientation in his employees. His su ors told him they were trying to correct the condition and that if his oyees didn't like it they could quit.

6. Production meetings attended by Complaint were held twice daily. plainant brought up safety complaints at these meetings and was accuse plaining and griping.

7. In early 1979, Complainant reported that loose rock and ground f ected part of the maintenance shop. The roof bolts had become loose. empt was made to correct the sitation but eventually the shop roof cav

11. During the time Robb was his supervisor, any safety complaints, oral or written, to [illegible] complaints made to prior supervisors.

12. On March 25, 1980, Complainant [illegible] Mike Robb's office. Robb, Troxell, [illegible], Industrial Relations Department and Complainant. Complainant that lack of water control [illegible] parts were not being properly handled and [illegible] complaining and very little action." He [illegible] availability and production abuse of equipment [illegible] his performance was not satisfactory and that he Robb and Troxell every Monday morning and all previous week. A deadline of May 1 was set [illegible] Complainant did not bring up any safety [illegible] meeting.

DISCUSSION

There is sharp disagreement between [illegible] place at the meeting. Neither Bennett was [illegible] According to Robb both were employed by other New Mexico. Complainant stated that Robb told him doing his job, but was going around complaining this to refer to safety complaining. Robb testified specific instances where Complainant's work was [illegible] testified that at the conclusions of the meeting resign and have "layoff status, severance pay [illegible] period of time, or he would be terminated. At the following morning. Robb testified that at the Complainant was told that he would in effect be counselled every Monday and would have to show [illegible] am generally accepting Mr. Robb's version of the

15. On August 8, 1980, Complainant filed his initial complaint wi
investigation was conducted and MSHA denied the complaint on January
mplainant filed his complaint with the Review Commission on January

SCUSSION

Complainant offered in evidence a copy of the MSHA Investigation
ch he received from MSHA Dallas Office. Respondent objected and I
e documents primarily because substantial portion of the investigati
d of the transcripts of interviews had been excised. Complainant di
tempt to subpoena the record or the investigator. The exhibit as of
some extent unintelligible and possibly prejudicial. I conclude th
uld be unfair to the parties and unhelpful to me to admit the exhibi

16. Robb left Respondent's employ on March 30, 1980. He knew on
80, that he was going to leave on March 30. He expected that the co
Complainant referred to in Finding of Fact No. 12 would be conducte
oxell.

ATUTORY PROVISION

Section 105(c) of the Act provides in part as follows:

(c)(1) No person shall discharge or in any manner discrimin
against or cause to be discharged or cause discrimination against
otherwise interfere with the exercise of the statutory rights of
miner, representative of miners or applicant for employment in an
coal or other mine subject to this Act becsuse such miner, repres
tative of miners, or applicant for employment . . . has filed or
made a complaint under or related to this Act, including a compla
notifying the operator or the operator's agent, or the representa
of the miners at the coal or other mine of an alleged danger or s
or health violation in a coal or other mine . . . or because of t
exercise by such miner, representative of miners or applicant for
employment on behalf of himself or others of any stautory right
afforded by this Act.

respect to Complainant. Complainant returned to underground duties February, 1980. His job title was 1700 level foreman and he was un immediate supervision of Jerry Troxell who became general undergrou foreman.

10. In February or early March, 1980, Robb told Complainant t thought the truck shop "was a complete mess" and that he would have the condition of the shop.

11. During the time Robb was his supervisor, Complainant did any safety complaints, oral or written, to him, nor was Robb aware complaints made to prior supervisors.

12. On March 25, 1980, Complainant was asked by Troxell to co Mike Robb's office. Robb, Troxell, Wayne Bennett, head of Responde Industrial Relations Department and Complainant were present. Robb Complainant that lack of water control had caused equipment to brea parts were not being properly handled and Complainant "did a great complaining and very little action." The complaints concerned lack availability and production abuse of equipment. Robb told Complain his performance was not satisfactory and that henceforth he would c Robb and Troxell every Monday morning and discuss his job performan previous week. A deadline of May 1 was set for Complainant to show Complainant did not bring up any safety complaints or concerns duri meeting.

DISCUSSION

There is sharp disagreement between Complainant and Robb as to place at the meeting. Neither Bennett nor Troxell was called as a According to Robb both were employed by other companies out of the New Mexico. Complainant stated that Robb told him he (Complainant) doing his job, but was going around complaining all the time. Comp this to refer to safety complaining. Robb testified that he pointe specific instances where Complainant's work was unsatisfactory. Co testified that at the conclusions of the meeting he was told that h resign and have "layoff status, severance pay (and) insurance cover period of time, or he would be terminated. An answer was demanded following morning. Robb testified that at the conclusion of the me Complainant was told that he would in effect be placed on probation counselled every Monday and would have to show improvement by May 1 am generally accepting Mr. Robb's version of the meeting. This is

Complainant filed his complaint with the Review Commission on January

DISCUSSION

Complainant offered in evidence a copy of the MSHA Investigation which he received from MSHA Dallas Office. Respondent objected and I the documents primarily because substantial portion of the investigati and of the transcripts of interviews had been excised. Complainant di attempt to subpoena the record or the investigator. The exhibit as of to some extent unintelligible and possibly prejudicial. I conclude th would be unfair to the parties and unhelpful to me to admit the exhibi

16. Robb left Respondent's employ on March 30, 1980. He knew on 1980, that he was going to leave on March 30. He expected that the co of Complainant referred to in Finding of Fact No. 12 would be conducte Troxell.

STATUTORY PROVISION

Section 105(c) of the Act provides in part as follows:

(c)(1) No person shall discharge or in any manner discrimin against or cause to be discharged or cause discrimination against otherwise interfere with the exercise of the statutory rights of miner, representative of miners or applicant for employment in an coal or other mine subject to this Act because such miner, repres tative of miners, or applicant for employment . . . has filed or made a complaint under or related to this Act, including a compla notifying the operator or the operator's agent, or the representa of the miners at the coal or other mine of an alleged danger or s or health violation in a coal or other mine . . . or because of t exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any stautory right afforded by this Act.

occurrs, file a complaint with the Secretary alleging such dis-
crimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner, applicant for employment, or representative of miners alleging such discrimination or interference and propose an order granting appropriate relief. The Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section) and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest. The complaining miner, applicant, or representative of miners may present additional evidence on his own behalf during any hearing held pursuant to his paragraph.

(3) Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1). The Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section), and thereafte

sustained, granting such relief as it deems appropriate, including but not limited to, an order requiring the rehiring or reinstatement of the miner to his former position with back pay and interest or such remedy as may be appropriate. Such order shall become final 30 days after its issuance. Whenever an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner, applicant for employment or representative of miners for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation. Proceedings under this section shall be expedited by the Secretary and the Commission. Any order issued by the Commission under this paragraph shall be subject to judicial review in accordance with section 106. Violations by any person of paragraph (1) shall be subject to the provisions of sections 108 and 110(a).

SSUES

1. Whether the complaint is barred by the statute of limitations aches.

2. Whether Complainant voluntarily left his employment with Respo arch 26, 1980, or was discharged, actually or constructively.

3. If Complainant was discharged, was it related to activity prot nder the Act.

4. If Complainant was discharged for protected activity, what rel hould be awarded.

ONCLUSIONS OF LAW

1. Complainant and Respondent were subject to the provisions of t ederal Mine Safety and Health Act at all times pertinent hereto, and t ndersigned Administrative Law Judge has jurisdiction over the parties ubject matter of this proceeding.

2. The complaint is not barred by the limitations for filing clai ut in section 105(c) of the Act or by laches.

employment was terminated March 26, 1980. However, he remained on by reason of severance pay to July 15, 1980. He claims that he was because of his mother's illness at the time. Respondent asserts tha resulted from the delay because former supervisors Jack Miller, Way Jerry Troxell and Mike Robb have left Respondent's employ, and all are now living and working outside of New Mexico.

It has been held that the statutory filing deadlines are not j tional. Secretary/Bennett v. Kaiser Aluminun and Chemical Corporat 1539 (1981). See also Christian v. South Hopkins Coal Co., 1 FMSHR Local 5429 v. Consolidation Coal Co., 1 FMSHRC 1300 (1979); S. Rep. 95th Cong., 1st Sess. at 36, reprinted in LEGISLATIVE HISTORY of th MINE SAFETY AND HEALTH ACT OF 1977, Senate Subcommittee on Labor, C Human Resources (July 1978) 624 (hereinafter LEG. HIST.) ("It shoul emphasized, however, that these time-frames [in 105(c)] are not int jurisdictional.")

The questions to be considered here are whether Complainant sh justifiable circumstances for his delay in filing and whether the d prejudiced Respondent. See Herman v. Imco Services, 4 FMSHRC _____ (December 15, 1982).

The fact that Complainant remained on the payroll and suffered loss is, I conclude, sufficient reason justifying a delay in filing conceivable that Complainant feared that filing a claim could jeopa severance pay rights. Although Respondent claims prejudice, it did that an attempt was made to preserve testimony when it became aware claim was filed, or that it attempted to obtain the testimony of th employees by deposition. Complainant cannot be blamed for the dela the time he filed with MSHA and MSHA's decision 16 months later.

3. The complaints which Complainant voiced to his superiors c unsafe and unhealthful conditions under which he and his crew worke those described in findings of fact 3 through 7, constituted activi under the Mine Safety Act. Any adverse action because of this prot activity would violate section 105 of the Act.

4. Complainant left his employment with Respondent on March 2 voluntarily. He was not discharged and the termination of his empl not related to any activity protected under the Mine Safety Act.

n Finding of Fact No. 12, I accepted the testimony of Robb to the effe
he discipline imposed on Complainant at the March 25, 1980, meeting wa
ce him on a form of probation. He was not discharged. Apparently
ing to accept the probationary status, he voluntarily resigned. The
line was imposed solely by Robb. It resulted from Robb's evaluation o
inant's work performance. Whether the evaluation was accurate or whet
fair is not a matter for me to decide. I accept the testimony of Rob
omplainant made no safety related complaints to him and that he (Robb)
t aware of any such complaints having been made to others. Therefore,
scipline imposed by Robb, such as it was, was not related to activity
ted under the Act.

. Since Complainant failed to establish that he was discharged or
ise discriminated against in violation of section 105(c) of the Act, h
entitled to the relief sought in his complaint.

ORDER

n the basis of the above findings of fact and conclusions of law, the
int and this proceeding are DISMISSED.

James A. Broderick
Administrative Law Judge

.bution: By certified mail

L. Foutz, Esq., 409 South Second, P.O. Drawer 38, Gallup, NM 87301

y A. Lovejoy, Jr., Esq., Stephenson, Carpenter, Crout & Olmsted,
ffice Box 669, Santa Fe, NM 87504-0669

Brownfield, Esq., United Nuclear Corporation, Post Office Box 2248,
Fe, NM 87501

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. CENT 82-33-M
	:	A.C. No. 29-00159-05018
v.	:	Tyrone Mine & Mill
PHELPS DODGE CORPORATION, Respondent	:	

DECISION

Appearances: Marigny A. Lanier, Esq., Office of the Solicitor, U. S. Department of Labor, Dallas, Texas, for Petitioner, MSHA; James G. Speer, Esq. and Stephen W. Pogson, Esq., Evans, Kitchel & Jenckes, P.C., Phoenix, Arizona, for Respondent.

Before: Judge Merlin

This case is a petition for the assessment of a civil penalty filed by the Secretary of Labor against Phelps Dodg Corporation for an alleged violation of 30 C.F.R. § 55.9-2.

Section 55.9-2 provides as follows:

> Equipment defects affecting safety shall be corrected before the equipment is used.

The subject citation which is dated May 15, 1981 reads as follows:

> After talking with Kim Kersey, Maintenance Foreman, Kaye Staley, Driver, Milo Lambert, Miners Representative and Dave Kuester, Miners Representative, I have reason to believe there was a safety defect affecting safety on the #214 Muck Truck involving the front suspension in that prior to my arrival on the property there had been much controversy

> far as to ask for a blue card in order to go to the doctor if not taken off the truck or the truck repaired. On 5/8/81 a telephone call was received by the MSHA Office in Carlsbad, N.M. to voice their complaint. They were advised to contact Milo Lambert or Dave Kuester the Miners Representatives. I arrived on the property at approximately 1800 hours on the 13th of May 1981 on other business. We returned the following morning to complete the other business and to serve other complaints. When we arrived we noted that the #214 Muck Truck was in the truck shop being repaired. The morning of the 15th of May 1981 we served the complaint on the #214 truck. We learned that the #214 truck had been put into the shop for a routine maintenance service on the same morning that we were driving to Silver City, N.M. in that the company was aware that we were on the way over, because of a phone call to the company made by Sidney R. Kirk, Supervisory Inspector MSHA concerning the investigation of an accident.

The inspector who issued the citation testified that miner complained to MSHA that the suspension on the No. 2 haulage truck was bottoming out and represented a hazard safety (Tr. 10-11). As a result of this complaint the inspector was told to visit the mine and check out the tr (Tr. 10-11). At the hearing the inspector was confused a inconsistent about when he visited the mine and talked to the drivers (Tr. 11, 14, 17, 25, 27-28, 33-34, 41-47, 55) After reviewing his testimony I find that on or about May 15 during the day he visited the repair shop at the m and spoke to the repair shop foreman about the 214 truck (Tr. 27-28, 34, 43). When the inspector arrived the fron suspension already had been removed and a new suspension been installed (Tr. 14, 73-74). The shop foreman complai to the inspector about spending $6,000 to replace a front suspension that was still good but he said that the repla ment was being done because it was called for under the company's preventive maintenance schedule (Tr. 15-16, 55- The old suspension was in the back of the shop where the inspector could have seen it but he did not (Tr. 191-192, 194). The inspector admitted that he had no personal

or not to issue a citation after he had spoken to the drivers of the 214 truck (Tr. 21-22, 25).

That evening the inspector spoke to several drivers the 214 truck including Kay Stailey, Pedro Mondragon, K. W. Donaldson, Emory Baker, Juan Verdugo, and Ramon Na (Tr. 36-37, 45-46). According to the inspector they tol him that because of worn out suspensions the truck botto out, was unstable and control of its steering could not maintained (Tr. 17-18, 36). They also advised the truck rode rough and Ms. Stailey who told the inspector she dr the truck on May 8, said she had hurt her back because o the bad suspension (Tr. 46-48). Based upon what the dri told him the inspector decided to issue a citation, wrot up 2 days later and then mailed it to the operator (Tr. 22, 54). However, the inspector erroneously put down th issuance date as the day he had spoken to the foreman an the drivers (MSHA Exh. No. 1).

Five of the drivers who had operated the 214 truck testified at the hearing. The first and most important Ms. Stailey. It was she who complained to MSHA that on when driving the truck she injured her back due to the b suspension (Tr. 47-48, 85). She repeated these complain at the hearing, testifying that on May 8 the truck drove like a jackhammer due to bad suspension (Tr. 85-86, 92). She also contended that the cab and back of the truck we loose (Tr. 86, 93). She said she had complained three t that night and finally because her back hurt she asked f blue card which would have enabled her to go to the hosp (Tr. 87-88). On cross examination Ms. Stailey agreed th according to established procedures the drivers fill out checklist for each truck they drive (Tr. 95). If more t one truck per shift is driven by a driver, the driver mu fill out a checklist for each truck (Tr. 128). The chec sets forth several items including suspension, with resp to which the driver is supposed to report any problems o deficiencies (Tr. 96, Optr's. Exh. Nos. 2-8). There is a place on the form for driver comments. The checklist which Ms. Stailey filled out for May 8 indicates she dro the 219 truck, not the 214 (Optr's. Exh. No. 2). Ms. St contended that she made her 9's like 4's but the operato produced her checklists for the period April 1 through May 16 (Tr. 103-104, Optr's. Exh. Nos. 2 and 3). It is

evidence or even argue in support of Ms. Stailey's
ention. I find that on May 8 Ms. Stailey drove the 219
k. I also find in accordance with the checklist that
last day she drove the 214 truck was April 6 (Optr's.
Nos. 2 and 3). Ms. Stailey admitted that the April 6
klist did not indicate any problem with the suspension
she said she orally told her foreman the suspension was
(Tr. 109).

In addition, on cross examination Ms. Stailey admitted
on May 4 she had an accident driving the 217 truck when
ran into a berm (Tr. 109). She also admitted that on
5 she received a written warning from the operator for
failure to report the accident and for damage to the 217
k from the accident (Tr. 112). At first she denied
e was any damage, but subsequently she acknowledged
e had been some to the truck's ladder (Tr. 110, 118, 121).
lly, when asked whether she had visited a doctor on May 6
er own volition, Ms. Stailey first stated it was for
rgies but when confronted with the medical report of
visit agreed it was for back pain (Tr. 112-114).

Based upon the foregoing I do not find Ms. Stailey a
lible witness in any respect. I conclude she last drove
214 truck more than a month before she complained to
. Moreover, she complained to MSHA only a few days
r she had an accident with another truck, received a
ing from the operator and visited a doctor for back
. These circumstances demonstrate that her assertions
rding the alleged lack of safety on the 214 truck due to
suspension cannot be accepted.

As already noted, four other drivers of the 214 truck
tified. Mr. Mondragon who according to the checklist
e that truck only on April 5 and April 25, stated it
rough and fishtailed although he did not indicate this
is checklist (Tr. 125-126, 131, Optr's. Exh. No. 4). He
he orally told the dispatcher in the tower about the
h riding and fishtailing and that the dispatcher was
osed to tell the foreman (Tr. 132). However, he admitted
management "chewed out" drivers who did not complete
rate lists (Tr. 134).

about the suspension (Tr. 147), specifically it must have slipped his mind but alleged that he orally told the dispatcher about the suspension (Tr. 147-148). I conclude the weight to be accorded the allegations of these two witnesses regarding the suspension on the 214 truck is greatly diminished because they did not put anything on their checklist although they knew this was required. Moreover, these two drivers drove the 214 truck on few occasions.

A third driver, Mr. Verdugo, did indicate a suspension problem on his checklist for May 2 when he drove the 214 truck (Optr's. Exh. No. 7). However, he acknowledged he did not drive the 214 truck very often since his assigned truck was the 216 (Tr. 174). Even more importantly, Mr. Verdugo's complaints regarding the rough riding of the 214 truck must be viewed in light of the fact that he had a severe back problem, was operated on for a ruptured disc on July 28, 1981 and was out of work for this condition from June 17, 1981 to October 7, 1981 and from November 7, 1981 to January 4, 1982 (Tr. 183-184). Finally, Mr. Verdugo continued to complain about rough riding on the 214 truck after the suspension had been replaced (Tr. 180-182). In light of the foregoing circumstances, I do not find Mr. Verdugo's testimony persuasive regarding alleged safety hazards and the nature of the ride on the 214 truck.

The fourth driver who testified was Mr. Donaldson. He was assigned to the 220 truck but because he traded shifts with a driver named Dave Brown, he drove the 214 truck around the time Ms. Stailey made her complaint (Tr. 150-151). Mr. Donaldson said that the 214 truck rode rough compared to the other trucks but the only checklist he completed for the 214 truck which mentioned the suspension was dated May 12, 4 days after Ms. Stailey complained (Tr. 151-152, Optr's. Exh. No. 6). Mr. Donaldson admitted he did not always fill out the lists accurately (Tr. 157). He stated that he did not know for sure whether he had noted the suspension as a problem on May 12 because Ms. Stailey had spoken to him about her complaint, but he readily admitted he wished to help her (Tr. 167, 171-172). Even more importantly, Mr. Donaldson admitted that he did not consider the 214 truck unsafe for him when he was driving it (Tr. 171). I find Mr. Donaldson's opinion regarding the safety of the 214 truck which was given with candor to be persuasive and I accept it.

ers who testified did not use the 214 very often. The
klists for the 214 truck reveal other drivers used that
cle with greater frequency than those who testified.

The operator's repair shop foreman, Mr. Kersey, testi-
that haulage trucks are given priority in maintenance
repairs because they are essential to production (Tr.
7). Suspensions are changed on haulage trucks every
0 to 10,000 hours (Tr. 70, 201). On April 17 a work
r was issued to change the suspensions on the 214
use it was the truck whose suspensions had the most
s (Tr. 68-70). On April 21 and May 2 the operator
ived rebuilt suspensions which were installed on the 214
k on May 13 (Tr. 78, 83). The foreman looked at the
ensions before and after they were changed and he saw no
cts (Tr. 211). As already noted, the inspector did not
them. In addition, x-rays of the suspensions taken off
214 truck showed no cracks (Tr. 204). The foreman
ed that when the suspensions were removed, "donuts",
h are rubber cushions in the suspensions and which would
disintegrated if there had been a bottoming out of the
k, were found to be intact (Tr. 198, 204-205, 216). The
man further testified that the suspensions were being
aced pursuant to the company's maintenance program and
aid that up to the time of the inspector's visit he did
know of any miner complaint to MSHA about the 214 truck
69-70, 203, 208-209). I find the foreman credible and
cept his testimony. I conclude therefore, that the
ensions were being replaced pursuant to the regular
entive maintenance program and I reject any suggestion
were changed in order to avoid issuance of a citation
use a complaint had been made to MSHA. I further conclude
the suspensions were free from defect and that there
no bottoming out on the 214 truck.

Mr. Chandler, the parts and service consultant for the
facturer of the 214 truck, testified that he had driven
y truck Phelps Dodge had and that trucks like the 214
to drive bumpy (Tr. 230). Both Mr. Kersey and
Chandler listed a number of factors which would cause a
h riding truck including speed and road conditions
209, 230-231). Finally, the 214 truck as described by

Based upon all the evidence I conclude that there w
no defects in the suspension of the 214 which affected
safety. For reasons already noted, the principal compla
upon whom MSHA relied is not credible. But to the exter
that some of the other drivers believe the 214 was unsaf
because of the suspension, I find more persuasive the co
trary evidence of the operator which demonstrates that t
was nothing wrong with the suspensions and that they wer
being replaced pursuant to routine maintenance procedure
I already noted the opinion of one of the drivers,
Mr. Donaldson, that the 214 truck was not unsafe but onl
rough riding and I rely also upon the infrequency with w
the checklist for the 214 identified suspension as a pro

I recognize that under the Act miners are strongly
encouraged to participate in the preservation and mainte
of health and safety in the mines. They are after all,
ones whose lives are on the line. But the positions mir
take and the complaints they make must be supportable ar
prevail over contrary evidence produced by operators acc
of violations. In this case MSHA failed to prove a viol
The great weight of probative evidence favors the operat

ORDER

Accordingly, it is ORDERED that Citation No. 173586
be Vacated and that the petition for the assessment of c
penalty be DISMISSED.

Paul Merlin
Chief Administrative Law Judge

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Pro Docket No. PENN 8 A.O. No. 36-00970
v.	:	Maple Creek No. 1
U. S. STEEL MINING CO., INC., Respondent	:	Docket No. PENN 8 A.O. No. 36-03425
	:	Maple Creek No. 2
U. S. STEEL MINING CO., INC., Contestant	:	Contest of Citati
v.	:	Docket No. PENN 8 Citation No. 9901
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Maple Creek No. 1 Docket No. PENN 8 Citation No. 9901
	:	Maple Creek No. 2

DECISION AND ORDER

These consolidated review-penalty cases are b the parties' waiver of hearing and cross motions f decision on stipulated facts. The dispute centers proper interpretation of the facts and applicable core issues are:

1. Whether a sample of respirable dust taken a single shift by a duly certified repres of the Secretary (a coal mine inspector) accord with the procedure prescribed by t

3. Whether the violations charged "could have contributed to a significant and substantial" mine health hazard.

Findings and Conclusions

The fundamental requirement of the respirable dust stan that the average concentration be continuously maintained below 2 milligrams per cubic meter of air ($2mg/m^3$). ction 202(a), 30 C.F.R. 70.100. The two milligram standar ist be lowered, however, whenever the total respirable dust ss in the mine atmosphere contains more than 5% quartz. ction 205, 30 C.F.R. 70.101. Consequently, when sections 2(a) and 205 are read together the statutory respirable al mine dust standard is 2 milligrams (not to exceed 5% artz) per cubic meter of air.

When the presence of an excessive concentration of quar detected, the operator is thereafter required to maintain e respirable dust mass below an average concentration of milligrams of air cubed. The applicable standard is deter dividing the percentage of quartz into the number 10. C.F.R. 70.101. The formula for determining the applicabl spirable dust standard when quartz is present was prescrib the Secretary of Health Education and Welfare, now the ecretary of Health and Human Services. It was derived from

In these cases, the percent of quartz present on t mechanized mining units in question was 11%. Therefore the average concentration of respirable dust in the min atmosphere associated with the two units had to be ther maintained at 0.9 milligrams of respirable dust per cub meter of air (10/11 equals 0.9 mg/m^3).

I

Samples for determining the percent of concentrati quartz in the respirable dust mass present in the mine are taken by the Secretary of Labor through duly certif mine inspectors. Such single shift samples are not use determine compliance with the mine dust standard in eff at the time the sample is taken. The percent of quartz merely used to set the standard for future sampling. I if the percent of quartz in the sample analyzed is more 5 the Secretary will give the operator notice of a lowe standard which will thereafter be used to establish com or noncompliance on the basis of averaging multi-shift taken by the operator during his next bi-monthly sampli 30 C.F.R. 70.201, 207.

The operator says this procedure is contrary to th which, it contends, requires all respirable dust sample taken by the operator. MSHA, the operator claims can c

asserts the respirable dust samples taken by certified
ho are not employed by the operator are not samples
be used to lower the 2 milligram standard.
nd the contention without merit.
ion 202(g) specifically authorizes the Secretary of
his delegate to "cause to be made such frequent spot
ns as he deems appropriate of the active workings of
s for the purpose of obtaining compliance with /the
e dust standards/ of /Title II/. Legislative History,
1124 (1970). This authority is complemented by that
section 104(f) which sanctions use of "samples taken
inspection by an authorized representative of the
" to determine whether the "applicable limit on the
tion of respirable dust required to be maintained
s Act is exceeded", and, if so, for issuance of a
fixing a reasonable time for abatement."
road underlying authority, of course, is section
and (4) which authorize inspections, and therefore
to obtain "information relating to health conditions
uses of diseases" and to determine "whether there
nce with the mandatory health standards . . . or
uirements of this Act". The cumulative import of
ority provides compelling support for the view that

Under section 205 of the Coal Act the Secretaries Interior and of Health, Education and Welfare were delg authority to develop and promulgate a formula that woul a reduction in the applicable respirable dust standard the quartz content of respirable dust in the atmosphere exceeded 5 percent. 2/ The formula, which issued in Ma 30 C.F.R. 70.101, required that whenever the "concentra respirable dust in the mine atmosphere" contained "more 5 percent quartz" the applicable respirable dust standa for that working place should be reduced by an amount c "by dividing the percent of quartz into the number 10".

1/ The operator has withdrawn its improvident assertion a "practical matter" the trial judge should take notice fact that the integrity of the entire sampling program jeopardized by allowing federal coal mine inspectors to samples. Counsel for the operator admit they have no e to support such inflammatory assertions.

2/ Section 205 constitutes a legislative recognition of iological studies show that the different co dust such as quartz and coal dust as well as concentration or density are factors which fibrotic lung tissue and the development o ssive fibrosis.

rystalline silicon dioxide) is classified a ıst that causes scar tissue (fibrosis) to b when inhaled in excessive amounts. In 196 ference of Governmental Industrial Hygienis eshold Limit Value (TLV) of 100 micrograms ıbic meter of air over an eight hour period

(continued on page 6)

quartz in the dust. Based on studies done in 1929 and 193
was determined the toxicity limit (TLV) for quartz dust
0.1 milligrams per cubic meter of air. The formula
eloped by the National Institute for Occupational Safety a
lth (NIOSH) for applying this limit was: TLV equals 10
ided by the percent of respirable quartz found in a sample
respirable dust. 4/

Thus, if the quartz component of the average concentratio
respirable dust during a single shift is 5 percent of a
illigram mass, the concentration of quartz is 100 microgra
milligrams) per cubic meter of air and no reduction in the
al concentration of respirable dust (2mg/m3) is mandated.
/5 equals 2). On the other hand, if the respirable mass
ndard was 3 milligrams of air cubed, the 5 percent limit wo
ll require it be lowered to 2 (10/5 equals 2) if the
rtz content exceeded 5 percent.

---

the airborne concentration of quartz to which it is believ
t workers, including miners, may be repeatedly exposed day
er day without adverse effect. NIOSH has recommended that
concentration level be reduced to 50 micrograms (.05 mill
ms) but thus far MSHA has declined to adopt this as the ba
its formula for reducing the applicable respirable dust
ndard. 45 F.R. 23995 (1980).

Documentation of the Threshold Limit Values for Airborne
taminants, ACGIH, 1981 Supplement 364-365. This report
es that because the "percent quartz in respirable dust is
en quite different from the percentage in ... total airbor
t, ... the percent quartz for use in the respirable-mass T

190 micrograms of concentrated quartz dust which
twice the permissible dosage-exposure for each sh
record shows this exposure which began some time
continued until abated in January 1982.

The quartz standard issued in March 1971 and
without substantive change in April 1980. 45 F.R
From the inception of the enforcement program to
the procedure for evaluation of respirable quartz
was known as the Standard Method A7, or KBr (Pota
method. To perform the necessary chemical analys
infrared spectrophotography a sample of respirabl
weighing 1 to 4 milligrams was required. Because
collected during a mine health inspection usually
less than this amount it was often necessary to c
10 to 30 samples to make a composite sample of 1
The composite sample was then ashed, combined wit
bromide, pelletized and analyzed for quartz conte
an infrared spectrophotograph of the absorbance t
crystalline silicon dioxide.

5/ Apparently through inadvertance the phrase "co
of" was deleted before the words "respirable dust
rule as reissued. Since no notice was given of a
to change the statutory definition found in secti
it seems obvious the Secretaries did not intend t
the "average concentration" standard.

which quartz determinations could be made. For example, 1980 approximately 59,000 samples were collected and bmitted for quartz analysis. From these, only 1,500 quart alyses could be performed.

To increase the number of samples available for testing HA modified its analytical method in February 1981. The w method permits a quartz content determination to be made a single sample containing as little as 0.5 milligrams respirable mine dust. It was first developed by the tional Institute of Occupational Safety and Health (NIOSH) 1977.

Under the new method, the sample is ashed in a low-temp re, radio-frequency (RF) asher, the ashed residue is combi th potassium bromide, pelletized and analyzed for quartz u frared spectrophotometry. Use of the RF asher affords the vantage of being able to make a quartz analysis of a sampl ntaining as little as 0.5 milligrams of respirable mine du e new method, which is capable of detecting about one perc artz in an ashed sample weighing 0.5 milligrams is known a e Single Sample, Low Temperature Ash (LTA) method of antifying the quartz in a single valid sample of respirabl ne dust. Mine Safety and Health Administration's Procedur r Determining Quartz Content of Respirable Coal Mine Dust

This showed that quartz determinations with the "n
were within approximately 1 percent of the determi
obtained with the "old" method (i.e., for a determ
8 percent with the "old" method, the determination
"new" method would be 7, 8 or 9 percent). In addi
of single samples were analyzed to quantify the in
variability of the "new" method. This showed the
of variability was 17 percent as compared to the "
which was 10.8 percent. The difference in variabi
of no practical significance since the results of
determinations are truncated and reported as whole
that is, an analysis that results in a determinati
percent quartz is reported as 5 percent.

The variability of disparate samples is admit
on a limited amount of data. Samples to determine
or multi-shift variability were collected from fiv
17 sections. From a quantitative standpoint, 80 p
the time the average standard deviation about the
determined from at least five samples, was 2 perc
shift samples, i.e., those collected from the same
the same day, the variability was within a range o
minus 1 percent. The evidence shows, and the oper
dispute, that the variability between and among th

operator claims all this is irrelevant because,
e sample method fails to comply with the requirement
quartz determination be based on averaging five
f respirable dust. 30 C.F.R. 207.
dispositive issue, therefore, is whether the limit
ıble quartz dust can be enforced on the basis of a
ift gravimetric sample of the atmosphere of the
mining units cited or must be a composite of the
i-shift samples taken to determine compliance with
respirable mine dust concentration.
rt for the operator's position is found, it is claimed,
determination that "a single-shift respirable dust
uld not be relied upon for compliance determinations
respirable dust concentration being measured" is near
ıms. 45 F.R. 23997 (1980). Pointing out that each
nples in question was less than 2 milligrams, the
argues the sampling procedure followed to determine
ıtent was not a valid statistical technique because
ed the long-established requirement for multiple
eraging. 30 C.F.R. 207.
Secretary's answer is that the statute does not
ulti-sample averaging to determine the concentration
ble quartz dust. Section 202(f)(2). MSHA further

nor the Secretary, it is argued ever intended the pre-com
quartz sample, i.e., the sample used to establish the low
dust standard, be derived from a statistically valid samp
of the average concentration of the total airborne respir
dust to which the miners were exposed. The Secretary car
his burden, it is claimed, if he shows persuasively that,
after applying valid statistical techniques, a single shi
sample of respirable mine dust pictures, with scientific
accuracy, the concentration of respirable quartz dust in
the atmosphere during the shift on which the sample was t

Since a single shift sample of each of the continuou
miner operators (high risk occupations) cited showed a qu
concentration of 11 percent, the Secretary claims he had
discretionary duty to lower the total respirable dust sta
to .9 milligrams of air cubed and thereafter to enforce
that standard on the basis of multi-sample averaged "comp
samples. 6/

6/ While the Secretary claims single shift samples are ne
used to find a violation, one of the "Enforcement Example
given in the directive to inspectors states that where an
analysis of a single sample from an area subject to a low
standard has generated an even higher concentration or
percentage of quartz, "the inspector should issue a citat
upon receipt of the quartz analysis because there was a
violation at the time the sample was collected". Coal Mi
Safety & Health Memorandum No. 81-183-H, p. 8.

ction 205 provides:

coal mining operations where the concentration
respirable dust in the mine atmosphere of any
rking place contains more than 5 percent quartz,
e Secretary of Health, Education and Welfare shall
escribe an appropriate formula for determining the
plicable respirable dust standard under this title
r such working place and the Secretary /of Labor/
all apply such formula in carrying out his duties
der this title.

ction 202(c) provides:

ferences to concentrations of respirable dust in
is title mean the average concentration of respirable
st measured with a device approved by the Secretary
d the Secretary of Health, Education and Welfare.

ction 202(f) provides:

r the purpose of this title, the term "average con-
ntration" means a determination which accurately
presents the atmospheric conditions with regard to
spirable dust to which each miner in the active
rkings of a mine is exposed (1) as measured during
e 18 month period following the date of enactment
this Act, over a number of continuous production
ifts to be determined by the /Secretaries/, and (2)
measured thereafter, over a single shift only, unless
he Secretaries/ find, in accordance with the pro-
sions of section 101 of this Act, that such single
ift measurements will not, after applying valid
atistical techniques, to such measurement, accurately
present such atmospheric conditions during such
ift.

e legislative history of section 202(f) shows there
harp disagreement between the Senate and House over
t reliable method for sampling atmospheric conditions
rmine the "average concentration" of respirable dust.

the operators' interests succeeded in persuading
to adopt an amendment that would have required mu
sampling to determine the "average concentration"
matter was finally resolved in the Conference Co
report states:

> The substitute adopted by the conference re
> the operator to maintain continuously the a
> concentration of respirable dust in the min
> atmosphere during each shift to which each
> is exposed at or below the established maxi
> standard or the permitted maximum standard.
> also provides that the term "average concen
> means that for a maximum period of 18 month
> enactment, measurements of a minimum number
> the same production shifts in consecutive o
> are authorized to obtain a statistically va
> sample. At the end of this 18-month period
> requires that the measurements be over one
> duction shift only, unless the Secretary an
> Secretary of Health, Education and Welfare
> in accordance with the standard setting pro
> of section 101, that single-shift measureme
> will not accurately represent the atmospher
> conditions during the measured shift to whi
> miner is continuously exposed. H. Rpt. 91-
> 91st Cong., 1st Sess., 75; Legislative Hist
> Coal Act 1037 (1970).

From this, it is clear that the legislative pref
for single shift sampling and that multi-shift a
is the exception, not the rule. The operator, i
concedes that "the Secretaries have never expres
that a single shift sample will not accurately r
/the average concentration of respirable quartz

niques mandates continued use of the exceptional method,

, multi-sample averaging as the basis for the issuance
itations to enforce a lowered standard. 45 F.R. 23997.

I find that as a matter of law, section 202(f) of the
plainly authorizes use of single shift samples as the
is for determining the concentration of quartz and that
best available scientific evidence supports use of such
rocedure.

The operator has chosen not to challenge the evidence
uced by the Secretary to show that, after applying valid
tistical techniques, a single shift sample of respirable
e dust can be analyzed by a method which accurately measures
concentration of respirable quartz dust in the atmosphere
ng that shift. 7/ Instead it has generally cited studies
ating to the validity of gravimetric measurements of
pirable coal mine dust masses.

There is, of course, no dispute about the fact that
sonal gravimetric samplers were used to collect the respira
e dust in question. Furthermore, the relevant literature
ws that true dust concentrations in coal mines vary from

The operator's claim that the standard as applied arbitrari
uces the total dust level no matter how insignificant the
nt of quartz present is demonstrably incorrect. (Exh. 2).
operator makes no claim that exposure to more than 100
rograms of respirable quartz dust for eight hours a day, day

dust concentration in the atmosphere of a continuou
operator has a standard deviation of 70 percent. I
Respirable Dust Measurement 13-14 (1977).

But, says the Secretary, all this is irrelevan
after applying valid statistical techniques to the
spectroscopy method of analyzing single shift sampl
quartz it was found that the variability between an
single and multiple samples was relatively low, plu
1 or 2 percent. Indeed, this conclusion seems to b
corroborated by a study done by the operator's own
hygienists in 1970 or 1971. This study found it wa
using an x-ray diffraction technique to "estimate t
and calcite on individual filters where the dust lo
was 0.20 mg." The same report recommended that inf
techniques being used in England and Germany be car
studied to "determine whether this analytical proce
be applied to individual respirable dust samples".
claims, and I find its evidence supports the conclu
that by 1981 the infrared technique had been perfec
the point where it could be applied to samples with
as 0.5 milligrams of dust with the reproductibility
(coefficient of variation) between single and multi
so small as to be negligible.

sample because only 0.5 milligrams of dust is analyzed
ıer instance to determine the quartz content. As a
cal matter, of course, it makes quite a difference
e of the time and effort required to work with
ather than one sample. 8/

e percent quartz content, as previously indicated, is
ed as a standard but only as a factor in the formula
ducing the total respirable dust mass. The object is
p the quartz exposure within the permissible limit.
ct that a 7% quartz content of a .7 milligram sample
pe used to reduce the 2 milligram standard to 1.4
rams does not mean that a 49 microgram standard for
is being enforced. A simple calculation shows the
content of the .7 mg sample would have to reach 14%
it would equal 100 micrograms (.7 mg equals 700 ug X
uals 98 ug). The formula, on the other hand, is designed
ure that the quartz content of the reduced standard
does not exceed 100 micrograms or 0.1 mg quartz/m^3
g/m^3 X 7% equals 0.1 mg/m^3 quartz). Obviously, if
erator is achieving a .7 mg/m^3 concentration of respirabl
e will have no difficulty in complying with the lowered
standard.

8/ It is estimated that the use of the single sample procedure
result in "an annual [illegible] of about 3 inspection man-

(representative samples) of the average concentratio
dust in the relevant atmosphere during the shifts in
The operator's contest of the validity of the pre-co
samples, i.e., those used to lower the total dust st
is, therefore, denied.

III

The operator claims the violations in question
"significant and substantial" because there is no pr
evidence that exposure of miners to free silica (qua
generated "naturally in mining" is a significant hea
The Secretary responded with a report and supporting
from the National Institute for Occupational Safety
(NIOSH). This report concluded that an "intermittan
continuous" exposure to more than 100 micrograms per
meter of respirable quartz dust, regardless of the s
the total respirable dust mass, "constitutes a serio
substantial hazard to the health of miners." (Exhibi

g affidavit and the NIOSH report po
ailed to understand that the thres
rams per cubic meter of air for q
standard but the resultant of the formula a
to reduce the 2 milligram standard when the free sil
of an analyzed sample exceeds 5 percent. The 100 mi
limit is a constant that does not vary with the size
sample analyzed and is used solely as a regulator of
permissible respirable dust mass of 2 milligrams. T
is to insure that the concentration of respirable qu
in the atmosphere i aintain t or below 10 micr

icrograms) in the presence of coal dust results in a
istic effect that exacerabates the health risk involved
osure to respirable mine dust. The Secretary argues
s intended a finding of "significant and substantial"
e whenever an "incipient" health hazard can, on the basis
best available evidence, be said to pose a significant
f material health impairment over the long run. Finally,
laimed that a finding of "significant and substantial"
ranted wherever the fraction of free silica in the mine

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ample, if a single analyzed sample weighs .5 milligrams
e free silica content is 6 percent, the 2 milligram
rd will be reduced to 1.6 (10/6 equals 1.6 mg).
fter compliance is measured against the reduced respirable
tandard of 1.6 mg, not the threshold limit of 100
rams for quartz. The fact that the quartz content of
ple analyzed weighed only 25 micrograms (.5 mg equals
x 5% equals 25 ug) is irrelevant and does not mean
25 ug "standard" is being enforced when the limit is
. It simply means that since the compliance or enforcem
rd is 1.6 mg the actual amount of quartz in the en-
ent may regress to 100 micrograms or 20 percent of the
mass (.5 mg equals 500 ug x 20% equals 100 ug) before
duced standard (1.6 mg) would be violated. In the
at hand, it appears the analyzed samples were 1.7
rams and contained 11 percent quartz. This means the
ed sample had 190 micrograms of quartz ((.11) (1.7)) equa
g per meter cubed or 190 ug per meter cubed). The
ement or compliance samples averaged 1.3 mg and 1 mg
tively. This means that in the case of the 1.3 mg
the quartz content may have been approximately 15
t (1.3 mg/.19 mg equals 0.146%) and in the case of the
ample approximately 19 percent (1 mg/.19 equals 19%).

or continuous" exposure to any concentration of quartz du
in excess of the established hygientically safe level of
100 micrograms per meter of air cubed and more particular
a concentration of 11 percent (190 micrograms) in a respi
dust mass of 1.7 milligrams "constitutes a serious and sub
hazard to the health of a worker". 10/ (Exhibit 3). The
operator offered no fact-specific rebuttal to this eviden
Thus, the matter is before me on the operator's claim tha
the Secretary's evidence is, as a matter of law, insuffic
to establish the violations charged were "of such nature
could have significantly and substantially contributed to
cause and effect" of a mine health hazard. 11/ Section 1

10/ 1.7 milligrams was apparently the weight of the singl
samples analyzed for quartz (11% x 1.7 mg equals .19 mg o
190 ug). Inasmuch as the compliance samples averaged 1.3
and 1 milligrams, respectively, it appears that the conce
tions of quartz involved in the violations charged ranged
190 to 200 micrograms. This was substantially in excess
permissible exposure limit value of 100 micrograms.

11/ Although the matters are before me on the parties' cr
motions for summary decision, each has the burden of show
the indisputability of the facts which warrant judgment i
his favor. Moore's Federal Practice Par. 56.13. The Sec
evidence clearly establishes that the 100 plus microgram
is indisputably accepted by the scientific and medical co
as the safe limit for exposure to free silica. The opera
does not challenge this but claims such an exposure does
constitute a "significant and substantial" health hazard
(footnote 11 continued on page 20)

d on what is known and uncontradicted may in and of itself ubstantial evidence when first-hand evidence on the tion is unavailable. Industrial Union v. American Petroleu itute, 448 U.S. 607, 707 (1980), Dissenting Opinion; ardson v. Parales, 402 U.S. 389 (1971). I note that e the NIOSH report and its supporting documentation are part of the stipulated record the operator, in the face hat report, continues to stand on its cross motion and offered no evidence to contradict the report. With the er in this posture, I am free to infer there is no ence other than the pleadings and supporting instruments

use there is no evidence that the inhalation of quartz generated naturally increases the risk of developing cosis or black lung in either the short or long term. bald assertion is unsupported by any medical or scientific ence. It apparently depends upon a claim that an examina- of studies conducted in Great Britain concerning the tionship between quartz dust and the development of -workers' pneumonocoiosis shows there is no correlation. e studies are unidentified and were not submitted for record. The NIOSH report, on the other hand, deals specifi this issue and concludes the weight of reputable scientifi medical thought is that "a key factor in the development ilicosis is the duration of exposure multiplied by dust entration". (Exhibit 3, Para. 8). The studies submitted IOSH, and not disputed by the operator, also show that tz must be regarded as a possible cause of black lung, ecially where mixed dust exposure may be low, but the ortion of quartz high". (Exhibit 3, Reference 7, p. 1275; rence 11, pp. 123-125, Reference 14, p. 191).

Manetas v. International Petroleum Carriers, Inc
414 (3d Cir. 1976); Commission Rule 64. My revi
parties materials leads me to conclude there is
issue of fact with respect to the charge that th
cited were "significant and substantial".

I deal first with the Secretary's claim tha
centration of quartz in excess of the 100 microg
by section 205, 30 C.F.R. 70.101, is per se a si
and substantial violation.

Silicosis is a condition of massive fibrosi
marked by shortness of breath. It results from
of silica dust, is dose and time dependent and m
incurable. Only technical preventive measures i
can control or eliminate the problem. A descrip
silicosis, extracted from a primer prepared for

"Illustrates the disease's progress.

> om is shortness of breath, at
> during physical activity, bu
> r less and less exertion, unt
> victim is short of breath ev
> caused by many small round l
> elop from irritation by silic
> ard inelastic scars -- just l
> that result from an operation
> stiff, so that it takes more
> them with air. The scars a
> ls of the air sacs, blocking
> gen into the blood; tired bl

reaction to the silica may cause scars to join into larger scars; some may occupy the entire lung. This process, progressive massive fibrosis, is frequently accompanied by increasing susceptibility to tuberculosis and other infections. Finally, the heart, which must pump blood through these stiff, inelastic lungs, becomes weakened and enlarged and fails to pump effectively. 12/

Silicosis is a "continuum" or progressive disease. The nt of silica estimated to be inhaled in 50% of those who from silicosis is 5 grams. (Exhibit 3, Reference 5). is about one-half a teaspoon. While there is some rtainty over the manner in which the disease progresses its least serious to its disabling stage, it is certain prolonged exposure above safe limits contributes to the ression. It also appears that a severe stage of the ase may result from brief as well as intermittant or rrupted exposure. (Exhibit 3, References 5, 6). In its serious form, silicosis is a chronic and irreversible ructive pulmonary disease that like black lung or in ciation with black lung can create an additional strain

Stellman and Daum, Work is Dangerous to Your Health, Vintag s, New York (1973), 168. Only dust containing free (uncomb ca can cause silicosis. The disease is one of the monoconioses, a group of lung diseases which result from lation of excessive amounts of respirable dust in industria ronments such as mining, quarrying, foundrys and textile s See, American Textile Mfgrs. Inst. v. Donovan, 452 420 (1981).

in the development of black lung, the present consensus in reputable medical and scientific thinking is that qu dust exposure in excess of the established and accepted threshold limit of 0.1 milligrams per cubic meter of ai may be an important factor in the development and rapid progression of coalworkers' pneumonoconiosis. In fact, is no discernable disagreement over the fact that expos of miners to high concentrations of free silica (in exc of 5%) may, standing alone, or when mixed with coal min dust trigger over the short or long run, depending on i susceptibility, adverse pathogenic or fibrogenic reacti lung tissue. 13/

13/ Contrary to the operator's contention, the statute restrain MSHA from acting to prevent irreversible healt until miners actually suffer the early symptoms of sili black lung. Instead the law is a mandate to reduce the that irreversible damage--especially for those miners w regular exposure to the causal agent, respirable mine d

> MSHA and NIOSH have adequately docume e attributable to continued exposure evidence shows that the acute sympto in conjunction with black lung (anth pulmonary system and increase his o the adverse effects of subsequent pat tions 106(a)(6), (7), 202, 205 and re y together with Exhibit 3 and its att liography. For these reasons, I hold ategorize as significant and substant ure to quartz dust that passes the th ermissible exposure level of 100 micr

's was a severe health problem in the United States.
, the United Mine Workers of America and the Pennsylvani
ent of Labor and Industry surveyed pulmonary disease
nthracite miners. 14/ This study confirmed that the
ld or permissible quartz concentration of a respirable
s should not exceed 5 percent.

1950 the U. S. Department of Interior, Bureau of Mines,
the literature on dusts, with emphasis on the rela-
p to dust diseases. Efforts to control industrial dusts
storically relied on the medicolegal principle of dose
e. This principle holds there is a systematic relations
the severity of a response to an industrial dust
such as quartz and the degree of exposure. This in
based on the concept that the magnitude of toxicity
tz dust is proportional to its concentration in the
espirable coal mine dust mass. Thus, as the level of
e decreases there is a decrease in the risk of injury,
risk becomes negligible when exposure falls below
tolerable (threshold or permissible) levels or
rations. (Exhibit 3, Reference 3).

ers, Anthraco-Silicosis Among Hard Coal Miners, U.S.
Health Service Bulletin #221 (Dec. 1935).

Weighted Average (TLV-TWA) respirable

this formula as the percent of quartz increases the allowa total respirable coal mine dust mass is decreased. 15/ Th is the type of formula which Congress had in mind in enact section 205 and from which the Secretary of HEW derived th formula promulgated in 30 C.F.R. 70.101. 42 F.R. 59294 (1977). It is specifically designed to accommodate the 2 milligram limit on the total respirable dust mass in surfa and underground coal mines.

NIOSH and the ACGIH continuously review and monitor the toxicity of airborne contaminants to determine the saf concentrations to which most workers can be exposed withou endangering health. TLV-TWA's and NIOSH's criteria papers (Exhibit 3, Reference 8) are based on the best available evidence from industrial experience, from experimental hum and animal studies, and, when possible, from a combination of the three. 16/ The medical and scientific basis for th

15/ Documentation of Threshold Limit Values, (ACGIH, 4th e 364-365 (1981). The formula was first adopted in 1968 bas on work done by Ayer. See, Ayer, H.E., The proposed ACGIH mass limits for quartz: Review and Evaluation. Am. Ind. Hyg. Assoc. J. 1968; 29:336-342; Id. 30:117 (1969).

16/ TLV's Threshold Limit Values for Chemical Substances a Physical Agents in the Workroom Environment (1982), at 2.

for quartz dust has been incorporated in an improved standard, 30 C.F.R. 70.101, it has the force and effect

pplying the formula to the cases in question, the ary reduced the applicable 2 milligram standard to .9 rams. Thereafter compliance or enforcement sampling the lowered standard had been violated. The operator ot dispute this. It is clear that the violations did, in fact occur.

arther a preponderance of the evidence shows that for ears the medical and scientific communities have accepted ablished fact that the exposure of miners to free silica centrations that exceed 5 percent of the total respirable nss in their environment poses a significant risk to short and long term health. 17/ (Exhibits 2, 3).

t is obvious that in enacting section 205 Congress made cious decision to call upon the expertise of NIOSH IA and to delegate to them the authority to make a determination that would strike a balance between what is not the safe upper limit of quartz exposure.

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fact, NIOSH has urged that the limit be reduced to 2.5 or 50 micrograms. 42 F.R. 23995 (1980).

and deliberation in a lengthy public rulemaking proce
The operator's suggestion that the formula was plucke
thin air and arbitrarily applied is clearly mistaken.

I find there is an indisputable correlation betw
the level and duration of exposure of the respiratory
to free silica and the development of fibrogenic tiss
the lungs. Where, as here, the exposure substantiall
the threshold limit for an extended period of time al
as to the significance of the risk of a material heal
ment must be resolved in favor of the miners. 18/

18/ When Congress enacted section 101(a)(6) of the Ac
1977, it recognized that the validity and enforceabil
of health standards should be judged by criteria that
different than those applied to safety standards. Th
Supreme Court has confirmed this. See Industrial Uni
v. American Petroleum Institute, 448 U.S., supra, 649
American Textile Mgfrs. Inst. v. Donovan, 452 U.S. 49
512 (1981). Indeed in the Benzene case the Court hel
so long as an agency's findings as to the safe level
toxic or carcinogenic substance or physical agent are
by a body of reputable medical and scientific thought
agency is free to use conservative assumptions in int
the date . . . risking error on the side of overprote
rather than underprotection". Industrial Union, supr
656. It is axiomatic that occupational health legisl
is to be liberally construed to effectuate the Congre
purpose. Whirlpool Corp. v. Marshall, 445 U.S. 1, 13

significant risks of material [illegible]

find the Secretaries' complementary determination of the line between the safe and the unsafe while not demonstrabl with mathematical nicety accords with the best available medical and scientific evidence. This, I believe, is all that is required. Compare American Textile Mfgrs. Inst. v. Donovan, 452 U.S., supra, 495-504, 509. Indeed in view the legislative determination that the dose response curve is to be set at a 5 percent concentration in a total respi dust mass of 2 milligrams (0.1 mg) any attempt to alter th curve and thereby reduce the protection afforded the miner by the existing standard would fall afoul of section 101(a of the Act unless and until it can be shown that a less stringent standard will provide the same protection. 19/

The operator's reliance on Consolidation Coal Company Secretary, 4 FMSHRC 1559 (1982) is misplaced. There the t judge vacated an S&S charge on the ground the Secretary fa

19/ Section 101(a)(9) provides that "No mandatory health o safety standard promulgated under this title shall reduce the protection afforded miners by an existing mandatory he or safety standard". A rejection of the S&S charge would tantamount to a finding that exposure to quartz dust above the threshold or safe level is insignificant or de minimis and the risk insubstantial. This would vitiate the deterr effect of the S&S charge and run counter to the Congressio purpose that underlies section 104(e).

A preponderance of the probative medical and sci
evidence in these cases shows there was a measurable
ship between the concentrations of respirable quartz
and the pulmonary disorders of miners regularly expos
such concentrations. There is therefore substantial
to support the conclusion that the concentrations in
"could be a major cause of a danger to . . . health".
v. National Gypsum Company, 3 FMSHRC 822, 827 (1981).

I am mindful that the statute does not require
exposure to fibrogenic concentrations of quartz dust
an imminent health hazard, only a "reasonable likeli
an . . . illness of a reasonably serious nature" dur
miner's normal working life as the result of such ex
National Gypsum, supra, 828. It is undeniable that
is an illness of a "reasonably serious nature". Fur
the undisputed medical and scientific evidence shows
even intermittant exposure creates a "likelihood" or
possibility that a one-time (single shift) exposure
lead to a serious health impairment or functional di
Indeed, unless the threshold limit is to be rendered
it must be accorded the status of the determinant be
is and is not significant and substantial. A statut

on 101(a)(6) of the 1977 amendments to the 1969
lopted almost in haec verba the language of section
the Occupational Safety and Health Act. 20/ Under
ction 101(a)(6), the validity of procedures and
lesigned to attain "the highest degree of health
protection for the miner" are to be judged by
e Secretary has shown by the "best available evidence"
s more likely than not" that the permissible exposure
plus micrograms) presents a significant risk of
ealth impairment. Industrial Union v. American
st., 448 U.S. 607, 653 (1980). This standard
s a recognition by Congress of special problems in
health risks as opposed to safety risks. Id. at 649,
rican Textile Inst. v. Donovan, 452 U.S. 490,
. As the Court noted, in the case of safety hazards
are generally immediate and obvious, while in the
alth hazards the risks may not be apparent until

---

ly difference was the omission of the "feasibility"
found in the first sentence of section 6(b)(5).
lity" requirement is, however, to be found in
sentence of section 101(a)(6). The operator
laim that the 100 microgram standard is technologically
ally infeasible.

of possible future events and extrapolations from limited data. Industrial Union, supra, at 655-656; American Textile Mfgrs., supra, at 495-505, and n. 25. This does not mean that MSHA is clothed with unreviewable discretion. What it does mean is that MSHA's mandate necessarily requires it to act, even where information is incomplete, when the best available evidence indicates a serious threat to the health of miners. At the same time, to support a finding that a health hazard is significant and substantial MSHA has a duty to pinpoint the factual evidence and the policy consideration upon which it relied. This requires explication of the assumptions underlying predictions and extrapolations and of the basis for its resolution of conflicts and ambiguities. Thus, as I view the matter a Commission trial judge must exam not only MSHA's factual support, but also the "judgment calls and reasoning that contribute to its final decision. America Federation of Labor, ETC. v. Marshall, 617 F.2d 636, 651 (D.C Cir. 1979), affd. 452 U.S. 490 (1981); Industrial Union Dept. AFL-CIO v. Hodgson, 499 F.2d 467, 475-476 (1974).

21/ Congress wanted the Secretary to protect miners not only against known harms, but also against risks of harms not wholly understood. Comparable provisions in the OSH Act have been construed to embrace protection from the "subclinical effects" of a toxic substance. United Steelworkers of America v. Marshall, 647 F.2d 1189, 1251-1252 (D.C. Cir. 1980). Use of the S&S c

retary and NIOSH are legally sufficient to support
harges.

Order

premises considered, it is ORDERED that the contest
ations in question be, and hereby are, DENIED. It
ORDERED that for the violations of 30 C.F.R.
nd the operator pay a total penalty of $198 and
ct to payment the captioned matters be DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

on:

W. Moncrief, Esq., Office of the Solicitor, U.S.
nt of Labor, 4015 Wilson Blvd., Arlington, VA
ertified Mail)

Symons, Esq., U.S. Steel Mining Co., Inc., 600
reet, Pittsburgh, PA 15230 (Certified Mail)

v. : Docket Nos.

B & B MINING, INC.,
Respondent :

DECISION APPROVING SETTLEMENT

This proceeding involves two complaints of discharg or interference filed by Roger L. Hall against B & B Min to section 105(c)(3) of the Federal Mine Safety and Heal The complaint filed in Docket No. VA 79-128-D alleges th charged Hall on or about June 4, 1979, in violation of s the Act. Respondent alleges that it discharged Hall bec more days of work without obtaining permission to be abs contends that he was discharged because he requested tha Health Administration conduct a special inspection of re Hall requested an immediate arbitration hearing with res of June 4, 1979, and, as a result of that hearing, Hall prior position and awarded back pay.

The complaint filed by Hall in Docket No. VA 80-170 spondent again discharged him on or about April 7, 1980, section 105(c)(1) of the Act. Hall claims that responde for 1 week and 2 days. When the miners were called back leges that he asked that the mine be inspected before th work. The primary reason for requesting the inspection claim that respondent was using 12-inch roof bolts which labeled as 36-inch bolts. Management denied Hall's requ asked for 2 days of personal leave which, Hall says, wer then claims that when he returned to work, he was discha answer to the complaint in Docket No. VA 80-170-D allege charged for illegal picketing activities.

These cases were first assigned to Administrative L Laurenson who convened a hearing in Abingdon, Virginia, to consider the issues raised by the complaints. At the for respondent stated that respondent had filed a petiti February 21, 1980, and that the filing of a bankruptcy a stays all proceedings against a corporation until a part mission from the bankruptcy court to proceed. Judge Lau hearing that he was required by the provisions of 11 U.S tinue the cases until counsel for complainant had obtain the bankruptcy court to proceed.

Judge Laurenson rescheduled a hearing after permission to proceed ha
en obtained from the bankruptcy court, but that hearing had to be cance
cause of budgetary constraints. Judge Laurenson again scheduled the ca
r hearing, but that hearing also had to be canceled when Judge Laurens
came one of the judges who were subject to a reduction in force.

The cases were thereafter reassigned to me and I issued a prehearing
der on February 12, 1982, requesting that the parties provide answers
sic factual and procedural questions by March 12, 1982, but the time fo
swering had to be extended so that respondent's newly assigned counsel
uld obtain records from the former counsel who had withdrawn. Thereaf
ditional extensions of time had to be granted because complainant's co
s forced to undergo surgery for a serious back problem which involved
ng period of post-operative recuperation.

The cases were finally scheduled for hearing on January 11, 1983, i
ingdon, Virginia. Before a formal hearing had begun, I asked counsel
e parties if they had discussed settlement. Complainant's counsel sta
at he had not tried to settle the cases with the lawyer who was now re
enting respondent, but that he had tried unsuccessfully to settle the c
ith respondent's former attorney. Counsel for respondent indicated tha
s quite willing to discuss settlement. Therefore, the parties were gi
opportunity to discuss settlement. Shortly thereafter, counsel for c
lainant advised me that the parties had reached a settlement agreement
hich respondent had agreed to pay complainant an amount of $1,300 with
ect to the complaint filed in Docket No. VA 79-128-D and an amount of
ith respect to the complaint filed in Docket No. 80-170-D, or a total o
2,000 for both cases, including attorney's fees.

I find that the settlement agreement should be approved. Complaina
ad obtained a job with another employer after his second discharge and
ere was not a long period for which back pay could have been required
f a hearing had been held on the merits and an outcome favorable to com
lainant had resulted. Additionally, in view of the fact that responden
w involved in formal bankruptcy proceedings, the usual relief of reins
ent of complainant to his former position would not be possible.

WHEREFORE, for the reasons hereinbefore given it is ordered:

(A) The parties' settlement agreement is approved.

(B) Within 30 days from the date of this decision, the complaint f
n Docket No. VA 79-128-D shall be considered satisfied and dismissed up
ayment by respondent of $1,300.00 to complainant and the complaint in D

3. Commission Rules, 29 CFR 2700.1 et seq.

Issues

The issues presented in these proceedings include (1) whe named respondents have violated the provisions of the Act and regulations as alleged in the proposals for assessment of civi filed in these proceedings, and, if so, (2) the appropriate ci that should be assessed against each respondent for the allege based upon the criteria set forth in section 110(i) of the Act issues raised by the parties are identified and disposed of in of this decision.

In determining the amount of a civil penalty assessment, 110(i) of the Act requires consideration of the following crit (1) the operator's history of previous violations, (2) the app of such penalty to the size of the business of the operator, (the operator was negligent, (4) the effect on the operator's a continue in business, (5) the gravity of the violation, and (6 demonstrated good faith of the operator in attempting to achie compliance after notification of the violation.

Additional issues, as stated by petitioner MSHA in its po brief, are as follows:

1. Do the facts in this case support the conclusion that Austin Powder performed services at the Doan Strip Mine and therefore is liable under the Act for any violations resulting from the actions of its agents? Can Austin Powder limit its liability under the Mine Act pursuant to its service contract with Doan Coal?

2. Is the concept of strict liability applicable to the alleged violations of 30 CFR 77.1303(h) at issue?

3. On July 30, 1981, were the miners at the Doan Strip Mine given ample warning that a blast was about to occur?

4. If the violations of 30 CFR 77.1303(h) did occur, were they caused by the negligence of either Austin Powder and/or Doan Coal?

contractor within the meaning of the Act, and is not subject to the jurisdiction of MSHA with regard to the actions and events alleged in this proceeding.

All individuals allegedly committing violations were, as a matter of law, not employees or agents of Austin Powder at the time of the alleged violations.

The regulation which Austin Powder is charged with violating is unenforceably vague and ambiguous, as applied to the facts here.

Discussion

hursday, July 30, 1981, a fatal blasting accident occurred at Coal Company's strip mine, No. 1 Pit (stock pile area). vatroha, a laborer employed by Doan Coal Company, was observing ng operation from a stock pile, and while seated at, or running location, was struck by flyrock and other debris from the blast. l blasting work was being performed by Austin Powder Company, rson of a licensed blaster, Jeffrey Lucas and his crew, and the work was performed at the specific request of Doan Coal Company, o experienced blasters of its own. MSHA conducted an investigation cident, and at the conclusion of same issued the three citations on. All of the citations charge the named respondents with of mandatory safety standard 30 CFR 77.1303(h), which provides s:

> Ample warnings shall be given before blasts are fired. All persons shall be cleared and removed from the blasting area unless suitable blasting shelters are provided to protect men endangered by concussion or flyrock from blasting.

citations which were issued in these proceedings were issued investigation conducted by MSHA to determine the facts and nces surrounding a fatality which occurred when a miner was flyrock during blasting of overburden. None of the conditions es cited as alleged violations were actually observed by the s, and they issued the citations on the basis of information to their attention during the investigation. Two of the citations respondent Austin Powder Company by MSHA Inspector Lyle F. Bixler llows:

Richard C.

Richard C. Steffey
Administrative Law
(Phone: 703-756-

Distribution:

S. Strother Smith III, Esq., Attorney for Roger L. Ha
P. O. Box 1204, Abingdon, VA 24210 (Certified Mail)

Stephen A. Vickers, Esq., Attorney for B & B Mining,
Molinary, 212 West Valley Street, P. O. Drawer 1036,
(Certified Mail)

Roger L. Hall, Route 2, Box 465A, Chilhowie, VA 2431

Special Investigations, MSHA, U. S. Department of Lab
Boulevard, Arlington, VA 22203

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings
	:	Docket No. PENN 82-63
	:	A.O. No. 36-02695-03001 F E24
v.	:	
	:	Docket No. PENN 82-33
	:	A.O. No. 36-02695-03012 F
AUSTIN POWDER COMPANY, DOAN COAL COMPANY, Respondent	:	Doan Strip Mine

DECISIONS

ppearances: Robert Cohen, Attorney, U.S. Department of Labor, Arlington, Virginia, for the petitioner; William M. Ha Esquire, Cleveland, Ohio, for the respondent Austin Po Company; Robert M. Hanak, Esquire, Reynoldsville, Penn vania, for the respondent Doan Coal Company.

Before: Judge Koutras

Statement of the Proceedings

These proceedings involve proposals for an assessment of civil penalties brought by the petitioner against the respondents pursuan to § 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U § 820(a) (1978), for three alleged violations of 30 C.F.R. § 77.130 The citations were the result of a blasting fatality which occurred the Doan Strip Mine on July 30, 1981, and a resulting MSHA accident investigation with regard to that fatality. One of the citations w issued on July 31, 1981, and was served on the respondent Doan Coal Company, the operator of the mine in question, and the other two we issued on July 31 and August 6, 1981, and were served on the respon Austin Powder Company, an explosives company who MSHA claims was pe forming blasting activities on the mine property.

The cases were heard in Pittsburgh, Pennsylvania, and all part appeared and were represented by counsel. All parties were afforde an opportunity to file posthearing proposed findings, conclusions, briefs. MSHA and respondent Austin Powder filed post-hearing argum but respondent Doan Coal Company did not, but has opted to join the arguments advanced by Austin Powder. All arguments presented by th including those made at the hearing on the record, have been consid by me in the course of these decisio s.

3. Commission Rules, 29 CFR 2700.1 et seq.

Issues

The issues presented in these proceedings include (1) whether named respondents have violated the provisions of the Act and implregulations as alleged in the proposals for assessment of civil pefiled in these proceedings, and, if so, (2) the appropriate civil that should be assessed against each respondent for the alleged vi based upon the criteria set forth in section 110(i) of the Act. A issues raised by the parties are identified and disposed of in the of this decision.

In determining the amount of a civil penalty assessment, sec 110(i) of the Act requires consideration of the following criteria (1) the operator's history of previous violations, (2) the appropr of such penalty to the size of the business of the operator, (3) w the operator was negligent, (4) the effect on the operator's abil continue in business, (5) the gravity of the violation, and (6) th demonstrated good faith of the operator in attempting to achieve compliance after notification of the violation.

Additional issues, as stated by petitioner MSHA in its post-h brief, are as follows:

1. Do the facts in this case support the conclusion that Austin Powder performed services at the Doan Strip Mine and therefore is liable under the Act for any violations resulting from the actions of its agents? Can Austin Powder limit its liability under the Mine Act pursuant to its service contract with Doan Coal?

2. Is the concept of strict liability applicable to the alleged violations of 30 CFR 77.1303(h) at issue?

3. On July 30, 1981, were the miners at the Doan Strip Mine given ample warning that a blast was about to occur?

4. If the violations of 30 CFR 77.1303(h) did occur, were they caused by the negligence of either Austin Powder and/or Doan Coal?

2. Austin Powder was not, at the time of the alleged violations, and is not now, an operator, agent, or independent contractor within the meaning of the Act, and is not subject to the jurisdiction of MSHA with regard to the actions and events alleged in this proceeding.

3. All individuals allegedly committing violations were, as a matter of law, not employees or agents of Austin Powder at the time of the alleged violations.

4. The regulation which Austin Powder is charged with violating is unenforceably vague and ambiguous, as applied to the facts here.

Discussion

On Thursday, July 30, 1981, a fatal blasting accident occurred at the Doan Coal Company's strip mine, No. 1 Pit (stock pile area). Dennis Alvatroha, a laborer employed by Doan Coal Company, was observin the blasting operation from a stock pile, and while seated at, or runni from that location, was struck by flyrock and other debris from the bla The actual blasting work was being performed by Austin Powder Company, in the person of a licensed blaster, Jeffrey Lucas and his crew, and th blasting work was performed at the specific request of Doan Coal Compan who had no experienced blasters of its own. MSHA conducted an investig of the accident, and at the conclusion of same issued the three citatio in question. All of the citations charge the named respondents with violations of mandatory safety standard 30 CFR 77.1303(h), which provid as follows:

> Ample warnings shall be given before blasts are fired. All persons shall be cleared and removed from the blasting area unless suitable blasting shelters are provided to protect men endangered by concussion or flyrock from blasting.

The citations which were issued in these proceedings were issued after the investigation conducted by MSHA to determine the facts and circumstances surrounding a fatality which occurred when a miner was struck by flyrock during blasting of overburden. None of the condition or practices cited as alleged violations were actually observed by the inspectors, and they issued the citations on the basis of information which came to their attention during the investigation. Two of the cit served on respondent Austin Powder Company by MSHA Inspector Lyle F. Bi are as follows:

concussion or flyrock from blasting at the No. 1
Pit in that the contracted Austin Powder Co. blaste
Jeffery A. Lucas stated during testimony that flyro
fell across him and up to 30 feet behind him while
he was detonating a charge. This citation will not
be terminated until all persons are instructed on
the hazards of flyrock. This citation was issued
during an investigation of a fatal accident.

Section 104(a)-107(a) Citation/Order No. 1041345, August
which states as follows:

> The proper warning was not given by the contra
> blaster Jeffery A. Lucas, Austin Powder Co., prior
> to detonation of a shot at Pit 010 of Doan Coal Co.
> according to the posted requirements. This is a
> violation of § 77.1303(h) Part 77, 30 CFR. The
> blast signals which were posted at the mine entranc
> were: 3 ten second signals, 5 minutes before blas
> and short pulsating signals 1 minute before blast,
> clear, 1 prolonged 30 second blast (air horn) acco
> to testimony given during the investigation of a f
> blasting accident that occurred on 7/30/81 Pit 001
> Doan Coal Co., the signal given was three blasts (
> horn) that were sounded 30 seconds to 1 minute bef
> the shot was detonated. This Order will not be te
> until this unsafe practice is eliminated by the em
> being properly instructed on the safe procedures o
> blasting and such procedures are observed by an au
> Representative of the Secretary at Doan Strip mine
> 36 02695.

The third citation was served on the respondent Doan Co
MSHA Inspector Michael Bondra, on July 31, 1981, and the con
practices cited are as follows:

> All persons were not cleared and removed from
> the blasting area and suitable blasting shelters w
> not provided to protect men endangered by concussi
> or flyrock from blasting at the No. 1 Pit (001) in
> that Dennis Alvatrona, laborer was fatally injured
> by flyrock when blasting was done. This citation
> was issued during a fatality investigation and
> will not be terminated until all persons are
> instructed on the hazards from flyrock when blasti
> is done and remove themselves to a safe area. Dav

loading trucks. He was licensed by the State of Pennsylvania at the time of the shot in question on July 31, 1981, and he gained his exp as a blaster while working part time with Austin Powder while he was in school. He stated that he was faimilar with Doan Coal Company's strip mining operation, and he confirmed that he went to the mine si on July 30, 1981, for a "shot", and he did so after being requested there by Doan Coal. He stated that the mine site is some 20 to 25 m from his office, and that prior to the shot in question he had been the Doal strip mine four or five times a week with other blasters. 1981, he spent 50% of his work time at the Doan strip mine performin blasting, and that he usually spends from two to five hours a day th or as long as it takes to get the job done (Tr. 23-26).

Mr. Lucas stated that when he goes to the Doan strip mine he does so in response to a specific telephone or other request from Do He has a two or three man crew who assists him during the blasting operation, and he is in charge of his crew. He gives them their wor assignments, and depending on the job, two or three vehicles are tak along with the crew. The vehicles are driven off mine property at t end of the day and are not left there. He explained that the first he does when he arrives at the mine site is to locate the shot area as to determine whether the drilling has been completed. The site o shot is given to him by Doan Coal, and his job is to load and shoot shot. This entails the wiring of the shot, and one of his drivers w notify Doan Coal's employees where the shot will be fired, and this usually done approximately ten minutes before the shot is fired so t everything is shut down (Tr. 26-29).

Mr. Lucas stated that blasting signs are posted "coming into" t Doan property, but not at every shot blasting area. After the shot wired and the circuits tested, all mine machinery is shut down, and is the usual practice for one of his truck drivers to sound a signal The usual procedure calls for him to tell the driver to sound a sign and he does so by means of an air horn. At the time of the shot in question, the signal used was three 20-second blasts immediately pri to the shot. The siren would be sounding for at least a minute prio to the blast, but prior to that signal, no horns would be sounded. believed this was enough time for anyone to get out of the area beca the area is actually cleared before these signals are given. He exp that it was his responsibility to clear the blasting area, and he in that he did so by notifying everyone initially by radio and visually The radio notification is usually given 10 to 15 minutes before the detonation, and everyone at the mine who has a radio is on the same Those not in radio contact are notified personally (Tr. 29-33). How he acknowledged that prior to a shot he does not actually ascertain every employee on mine property happens to be doing before he notifi

the signalling procedure has changed so that five minutes be
shot is fired, three 20-second blasts of a horn are sounded,
prior to the actual shot there is a one minute blast (Tr. 29
a photograph (exhibit G-7-k), of a sign, and he indicated th
but was not sure, that such a sign was posted on July 30, ar
calls for three 10-second signals five mintues before detona
short pulsating signals one minute before the blast, and tha
calls for an "all clear" signal (Tr. 41). He believed that
was given, but again was not sure since he indicated that th
signalling responsibility is delegated to his truck driver (

Mr. Lucas confirmed that he detonated the blast in ques
that he was positioned about 300 feet away when he set it of
indicated that he was positioned "behind the blast", and he
that the blast is put into an open space or cut, and that th
"is going the opposite direction from me" (Tr. 44). He exam
exhibits, but could not state where he was located at the ti
actual shot, but did state that it was "in from the scale ho

Mr. Lucas stated that after the shot was wired, five to
elapsed before it was actually shot, and that he observed no
the blasting area during this time. He further defined the
as "anywhere that you suspect rock might fall", and he conce
was responsible to make sure that anyone in that area is in
location or protected (Tr. 50). He confirmed that he spent
at the Doan mine on July 30, and that he is paid by Austin I
(Tr. 51).

On cross-examination, Mr. Lucas stated that when he arr
blast scene, and before setting off the shot, he secured the
making a determination that no one was in the foreseeable da
area of the blast, and as far as he knew the area where the
found had been cleared. Part of the procedure for securing
included calling the mine office over the telephone and his
went to the scale house to notify persons of the blast. All
was shut down prior to the blast, and while he did not perso
the radio announcement, he is sure it was made (Tr. 51-52).
that Austin Powder's policy is to give radio warnings of imp
and that policy is still in use. This is in addition to the
or air horn signals and personal contact (Tr. 55). He secur
on the day in question and he did not see the victim when th
secured.

Mr. Lucas confirmed that as a result of the accident,
of Pennsylvania suspended his blaster's license for 90 days
restored after he took a test before the 90 days were up.

agents and that 24 holes were charged to a depth of some 45 to 50 feet. Each hole contained approximately 400 or 450 pounds of explosives, but each hole was detonated on a delayed basis, and did not go off all at once (Tr. 64). When asked how one determines what is a safe distance from such a shot, he stated that "there is no set formula for figuring the safe distance, * * * it is pretty much from experience you know wh the shot is going" (Tr. 66). He also indicated that a drill rig, a sh truck, and a driller's maintenance truck were all present near the bla site and that these constituted suitable blast shelters. If one is at a safe distance, there is no reason to crawl under these vehicles. Th shot was triggered electrically, and he confirmed that during 1981 he at the Doan Coal site three or five times a week performing blasting, and that 20 to 40 holes are usually charged at any given time (Tr. 69) He also confirmed that he is paid by Austin Powder Company, and that A Powder also provides and pays for other benefits such as vacation and insurance (Tr. 70). He does not belong to any union, and has performe blasting work for other strip mine operators similar to the work perfo for Doan (Tr. 71).

Mr. Lucas stated that he was "surprised" by the blast of July 30, in relation to other shots that he had in the same cut, and a lot more fly rock came out of the holes than he had expected. Some rock weighi approximately a pound or so, and four inches diameter landed near him, but most of the material was mud. He and his crew were around the tru but no one was under it, and he was 20 feet from the truck while the closest rock fell about six feet from where he was standing. Everyone had hard hats on, and no none from his crew advised him that any rocks had fallen near where they were standing (Tr. 73). He confirmed that was standing some 300 feet from the blast itself, and he stated that t charged holes were vertical and that the shot went out from the open c that had been charged (Tr. 74). Mr. Lucas stated that Doan Coal Compa does not have any licensed blasters, and since he has been working at the Doan Strip Mine they have never had any licensed blasters of their own (Tr. 74-75).

to control the blasting area. He believed that informati
warning signs should be the same as the actual warning si
He identified exhibit G-7(k) as a photograph of a warning
the blasting signals which are to be used, and he believe
depicted a proper or adequate warning system. He believe
since the signal system depicted gives a signal five minu
blast, provides for pulsating blasts before the actual bl
sequence would be ample time for anyone to get clear of t
did not believe that a one minute signal before the actua
be adequate (Tr. 84-93).

On cross-examination, Mr. Williams conceded that in
mining operation where a horn blast signal possibly could
he would personally contact people to warn them of any im
(Tr. 95). He also agreed that personal contact or radio
be sufficient notice to employees of any blasting. He al
means other than a posted sign would be adequate notice t
any given circumstances (Tr. 96-97), and he explained thi
he stated (Tr. 98-99):

> Q. So, what is posted on a sign is not determi
> ative, is not adequate notice in a particular
> factual situation?
>
> A. The sign itself should be proper as far as
> signals; however, to have communication with yo
> employees with equipment on the site, there is
> doubt in my mind that this would have to do wit
> communication to the operator, however, the sig
> should be sounded properly for people on the jo
> are not on equipment and otherwise.
>
> Q. The important factor is to make sure that
> employees do have notice that a blast is about
> take place, right?
>
> A. This is my concern. I think they should be
> notified.
>
> Q. The method by which those employees are no
> will carry from one situation to another, depe
> on the factual circumstances?

lliams also indicated that any posted sign signals should be and ever though hand signals or radio communications are used, warning signals should definitely be followed (Tr. 99).

Potempa, testified that at the time of the blast in question oyed by Doan Coal doing "a little bit of everything", but no longer employed there. He was at the mine site at the time st, and he stated that he arrived there in a pick-up and went le house. He arrived at the mine property "about less than es before the blast" and was on the main road and driveway le house. No one told him to take cover, but he knew there shot, and when he got out of his truck he went to the e to get a can of pop, but he did not go there for the specific getting out of the blast area (Tr. 100-102).

otempa stated that the scale house is a "good 300 to 400 feet" rea where the blast was fired, and when asked whether he believed nouse is a designated "safe area", he replied "it depends on re hiding from". He believed it was probably safe from any but indicated that the scale house was not posted with any arning signs. He also stated that a member of mine management, son of the owner's grandson, told him to go to the scale addition, Mr. Potempa stated that he heard the blast warning soon as he pulled up in front of the scale house and he he pick up. The blast went off "probably less than a minute ast warning signal was given, and he was in the scale house last went off. He looked out the window and saw "all kinds of ebris thrown all over the place", but none hit the scale house, ame close enough to cause any danger (Tr. 105).

otempa stated that when the blast was over, he drove his truck ckpile area which he described as being "off to the right" st area, and while he was there he observed the accident victim ne roadway leading to the stockpile. His hard hat was off, and the edge of the stockpile. Mr. Potempa stated that he did e the accident victim's body was "inside the blasting area", escribed as "probably about 300 feet away", hut that the victim "probably close to 300 feet" (Tr. 107).

otempa testified that he was familiar with the posted blasting gns which were on the mine property, and he indicated that the ven on the day in question were the "same type as the sign", d not specifically recall how many signals were sounded did not pay that much attention to it because "it is really

of the blast and he also believed that he was in no danger because he was not in the blast area (Tr. 109). He observed no trucks driving around immediately before the blast, and he confirmed that he saw rock into and around the coal pile where the victim was found. He also confirmed that he could not see the blaster from the scale house (Tr. 1

On cross-examination, Mr. Potempa confirmed that he knew the acci victim, and that when he first discovered him he was about 300 feet fr the actual location of the blast. He knew that the victim was working near the stockpile on a crusher, and his normal work station would be "the back part of the stock pile" (Tr. 112). His normal work station was farther from the blasting area than where he found him (Tr. 113).

Mr. Potempa stated that he went to the scale house for some shove for Mr. Doan's grandson Mike Stiles, and the scale house was located "on the other side of the hill from the blasting area". He heard no call over his pick-up radio because he had turned off the motor and wa outside the truck. He also stated that "there wasn't a bit of danger over there" (Tr. 114). He described his normal procedure for shutting down prior to a blast as follows (Tr. 116-118):

> ADMINISTRATIVE LAW JUDGE KOUTRAS: Had you just been out on the road when you heard the last one minute signal prior to the blast, what would you have done?
>
> THE WITNESS: I would have stopped and shut the pickup off.
>
> ADMINISTRATIVE LAW JUDGE KOUTRAS: Why would you have shut the pickup off?
>
> THE WITNESS: It is a natural thing. We always do it when they are going to shoot. If you are within so much range, because you know, the vibration, well, not too much in the pickup, but the dozer when it is run, it will crack the crank on it.
>
> ADMINISTRATIVE LAW JUDGE KOUTRAS: You are saying regardless of where you are on the mine site, if there is a blast, the normal procedure for all equipment is to stop it even though you are outside the danger zone?

THE WITNESS: Yes.

ADMINISTRATIVE LAW JUDGE KOUTRAS: And is the procedure that you followed on those other occasions approximately the same as on this date?

THE WITNESS: Right, right.

MSHA Inspector Michael Bondra confirmed that he conducted an inv tion of the blasting fatality on July 31, 1981, and he identified exh G-4 as a copy of the report he prepared. He stated that he measured the distance from the actual blasting location to where the accident victim was last seen and it was 223 feet. He observed large rocks ar clay in the area where the victim was found, and his investigation isclosed that the victim was struck by a single large rock weighing approximately 39 pounds (Tr. 125-129).

Mr. Bondra stated that based upon interviews and measurements, he determined that there was a clear view from the area where the vic was last seen and the location where the blast occurred. The distanc from the shot to the blasting portion was 300 feet, and Mr. Bondra believed that if the blaster were looking where the victim was last seen he should have seen his yellow hard hat (Tr. 130).

Mr. Bondra stated that the distance from the blasting location to the scale house was 400 feet, and that the house did not have a si on it designating it a "safe area". In his opinion, the persons insi the house would not have been protected from a rock the size of the o which struck the victim in the event that it hit the roof (Tr. 131). The scale house had a metal roof and framed material, and he believed the rock would have gone through (Tr. 132).

Mr. Bondra identified a sketch which he made as part of his inve report, and in which he labeled an area 100 feet long by 100 feet wi as the "blasting area". He stated that this was a mistake, and that area should have been labeled "blasting location". The "blasting are is defined by section 77.2, and it means "the entire area around the blasting location where the blasting is being done shall be cleared which concussion or flyrock material can reasonably be expected to ca injury" (Tr. 136).

Mr. Bondra believed that the victim, the scale house, and the bl and his crew were all within the "blasting area", and he reached this conclusion because flyrock and debris from the blast went beyond the areas where they w e all located (Tr. 137).

Mr. Bondra confirmed that he issued the citation charging of section 77.1303(h), and he did so because the victim, the bl crew, and the people in the scale house were not removed from t area. He determined there were no suitable shelters by the sca and he considered the violation to be very serious. He issued to Doan Coal because as the mine operator, Doan has the respons to comply and cannot delegate to this to an independent contrac believed that Doan should have been aware of the fact that all individuals mentioned were in the blasting area, and Doan shou seen to it that they were all removed. When asked what he bel be a "safe haven for miners", he replied "out, say 500 feet" (

Mr. Bondra confirmed that he interviewed loader operator who told him that he had received the blast warning over the r that he in turn gestured to the accident victim. The victim t to go back to the scale house, and Mr. Bloom assumed that's wh was going (Tr. 153). Mr. Bloom told Mr. Bondra that his motio victim was to "shut down your equipment" (Tr. 155).

Mr. Bondra believed that Mr. Bloom should have seen to it victim went to a safe place, and that his negligence in failin so is Doan Coal's negligence, and that Doan Coal should also h the road to and from the scale house and posted someone there the area (Tr. 156, 160).

On cross-examination, Mr. Bondra testified that he is not blaster and is not trained in the use of explosives or in geol stated that his opinion that 500 feet would be a "secure area" arbitrary stab" on his part, and that he does not have the bac in explosives to say it is safe or unsafe (Tr. 161).

Mr. Bondra conceded that his investigation report abstrac contained a statement that "the accident occurred when Dennis went to observe blasting operations" (Tr. 166). Mr. Bondra al that it was his reasonable belief that the victim, Mr. Alvatro in to view the blasting operation" (Tr. 167). He also concede Mr. Alvatrona must have been notified of the impending blast b went in to view it (Tr. 167).

Mr. Bondra confirmed further that he has never had a blas license, has never taken a blaster's test, had had no training in blasting, has never read any blasting literature, and does himself out as an expert in explosives or blasting (Tr. 171).

ed are not verbatim (Tr. 171-173).

Bondra stated that a piece of equipment can be a blasting shelter, nfirmed that a drill rig was near the blaster. He also stated rig would be a sufficient shelter if the blaster were under y close to it(Tr. 182). He believed that the blaster should be in sition in a sheltered area so he can jump back where no flying will strike him (Tr. 182). He indicated that his investigation etermine where the trucks were located, and as far as he is the only safe area within the 500 blast area was under the drill 185).

Bondra confirmed that there would be no violation if the blasting under the trucks, and while he also confirmed that he heard testify that his crew took cover by or under the trucks, he at he was not aware where the crew was (Tr. 188).

urther response to questions from the bench, Mr. Bondra stated s (Tr. 193-196):

Q. You were influenced by the fact that you had some testimony by the blaster himself that the debris went sailing over his head, right?

THE WITNESS: Yes.

Q. You came to the conclusion that these guys were in the blasting area and were not safe and were exposed to a hazard, right?

THE WITNESS: In a sense, yes.

Q. Well, I mean that is a fact, is it not?

THE WITNESS: Yes.

Q. Had the fact shown that no debris went as far as the scale house and no debris went as far as the blaster, then those two people would not have been in the blast area, would they have, in your opinion? You would not have concluded that in your report?

THE WITNESS: According to the definition of blasting area, no.

is that the only way a blaster can guarantee what the blasting area is is to blast first to find out how fa the debris goes, and then blast again to make sure ev body is out beyond that; is that correct?

THE WITNESS: No. Would his experience tell him what the blast area is?

Q. Did you hear Mr. Lucas' testimony in this case th based on his experience he felt he had his men remove from the blasting area; and, later on in his testimon he said that this was an unusual blast?

THE WITNESS: Was that an opinion?

Q. Well, do not the regulations put the responsibili on the blasting man to determine what a reasonable distance is?

THE WITNESS: Yes.

Q. I am trying to determine what is the blasting are What if the blaster came to you and said, Mr. Inspect I would like you to give me your opinion of what you believe the blasting area is. I have 24 holes loaded and we are ready to shoot. Before I shoot, I want to sure I am in compliance with the standard. I need so technical advice from you, and I would like you to te me how far I have to remove these guys, my crew, to m that none of them are hurt by flying debris. What wo you tell them, or what would you in a position like t advise him?

THE WITNESS: I am not really in a position, but the has a ruling of 500 feet, and we have accepted that f long time.

Q. The State has what?

THE WITNESS: They have a rule in effect approximatel 500 feet. They have issued that situation, and I thi -- I don't know how -- like I said, I'm not a state inspector.

MSHA Inspector Lyle F. Bixler, confirmed that he was at the mine on July 31, 1981, to assist in the accident investigation. He stated that he has underground blasting experience, and he indicated that a sketch labeled "Doan exhibit 4" fairly depicts the area he observed on July 31, except for the presence of a crusher near the stock pile. He indicated that the distance from the blast to where the victim was sitt was 223 feet, and that the distance from the blast to where the blaster was located was 300 feet (Tr. 204-208).

Mr. Bixler confirmed that he issued a citation to the Austin Powde Company, exhibit G-2, and he did so because of MSHA's policy to serve oth the contractor and mine operator when their personnel are involved He believed that Doan Coal Company depended on Austin Powder to provide a service safely. Austin Powder had a continuing presence at the mine because "they would be there pretty much of the time" on six or seven lasting jobs for Doan Coal (Tr. 212).

Mr. Bixler confirmed that he issued the citation to Austin Powder ecause the blasting crew was not out of the blasting area, and he dete this fact "because of the flyrock and debris that fell around the blast area". He also stated that he did not know whether it was unusual for a blaster to be within 300 feet of a shot area, and he "guessed" that the size of the explosive shot and the terrain would have a bearing on this question (Tr. 214). He believed that the citation was very seriou in that more people could have been killed or injured, and he also beli the citation was "significant and substantial" because it was likely that serious injuries could have occurred because of the flying debris and rock that fell around the blaster (TR. 216).

Mr. Bixler stated that he considered Mr. Lucas to be an employee of Austin Powder, and he believed that Austin Powder was negligent for not removing the blaster and his crew from the blasting area. He confi that he filled out an "inspector's statement", and that he indicated th he stated that Austin Powder, as the "operator", was responsible for th and for clearing the area. As the employer of the blaster, he consider that Austin Powder was responsible for the blaster's actions. He also believed that three or four people were exposed to a hazard, namely, he blasting crew, the blaster himself, and the people in the scale house (Tr. 219-221).

Mr. Bixler also confirmed that he issued a second citation to Aust Powder on August 6, 1981, for a separate violation of section 77.1303(h namely, that portion that requires an ample warning to be given before any blast (Tr. 222). He made the determination that no ample warning was given on the basis of statements made by persons during his investi

that he motioned the accident victim that a shot was going to be but that he (Bixler) did not follow up and ask Mr. Bloom what he by his motions to the victim (Tr. 224). Mr. Bixler also conclud since the victim was only 223 feet from the blasting location, "h wasn't warned" (Tr. 225). Mr. Bixler believed that the blaster v in not following the posted warning sign (Tr. 228).

On cross-examination, Mr. Bixler confirmed that most of the made in MSHA's accident investigation report were made by Inspect and that he (Bixler) assisted in the making of the measurements in the report (Tr. 228). Mr. Bixler conceded that at the time he the citation to Austin Powder, he did not take into account Mr. assertion that he believed 300 feet to be a safe distance from th Mr. Bixler also stated that he could not recall discussing this Mr. Lucas, and that he did not take into account any geological atmospheric conditions which may have been considered by Mr. Luca to the blast (Tr. 231). Mr. Bixler also conceded that Mr. Lucas have the safety of his crew in mind prior to the blast, but probe not anticipate the actual force of the blast (Tr. 234).

In response to further cross-examination, Mr. Bixler confir that he is not a blaster and has never held a blaster's lincense also indicated that he has never done any surface blasting, is n blasting expert, and that in the event he has need for informati blasting techniques or procedures he would have to consult a bla expert (Tr. 236). In this case, he indicated that he spoke with Austin Powder's licensed blasting technical representative Ray T but he was not aware of the fact that Mr. Thrush holds a certifi from MSHA qualifying him to train other blasters. He could not Mr. Thrush telling him that Mr. Lucas acted in a normal and prud manner at the time of the blast in question, nor could he recall and Mr. Thrush advising him that the particular flyrock shot in direction could not have been anticipated (Tr. 237).

Mr. Bixler identified a copy of his "inspector's statement" he filled out on July 31, 1981, with respect to citation no. 104 (exhibit AP-8). He confirmed that he marked the first block und the heading "negligence" to show that the condition or practice "could not have been known or predicted, or occurred due to circ beyond the operator's control". He also confirmed that he expla under the "remarks" column of the form where he indicated that " blaster notified all persons of the impending blast about 10 min

31, 1981, it was returned to him by his supervisor who advised
the form had been returned by someone in the "Washington Solicitor's
who advised his supervisor that he (Bixler) could not conclude
stin Powder was not negligent (Tr. 242). Mr. Bixler did not know
ıtity of the solicitor, and on the basis of instructions received
s own supervisor, Mr. Bixler prepared another form stating that
Powder was negligent (exhibit ALJ-1), and that form was resubmitted
ıber 16, 1981. He reached his "new" opinion that Austin Powder
ıave cleared everyone from the area on the basis of his observations
far the flyrock went after the occurrence (Tr. 243; 257-261).

Bixler stated that he did not have the technical background or
se to question Mr. Lucas' judgment that he believed he was at a
stance prior to the blast (Tr. 244). Mr. Bixler believed that the
lg at the blast area was a "safe area" if men were under or in
244). He also believed that the blaster "should be at least close
to it that in the event he needs to get under it, he could" (Tr. 244).
instant case, he believed that Mr. Lucas "should have been closer
drilling rig", and did not think that he could have gotten under
a distance of 25 or 30 feet. Mr. Bixler also stated that Mr. Lucas
y thought he was at a safe distance, and when asked what advice he
ive someone who may ask him how far back from a blast would be "safe",
ied "on the side of safety; and, from what we found out here, I
ay at least 500 feet. That's a rough guideline" (Tr. 245-246).
, he also stated as follows (Tr. 246):

Q. You would say that in very instance blasters should be at least 500 feet?

A. Not necessarily, no.

Q. It could vary depending upon a number of factors?

A. Sometimes 500 feet, it wouldn't be enough.

Q. Other times it would be more than enough?

A. That's right.

Q. And you really do not have the technical expertise or background to give advice to someone on whether he would be in violation of the law or whether he would be safe at a certain distance?

circumstances?

A. Under normal conditions, yes, but under extreme conditions, no.

With regard to his conclusions that an adequate blast warning was not given to employees in this case, Mr. Bixler testified as follows (Tr. 247-250):

Q. The purpose of this statute is to make sure that those employees who were in the area would be given a sufficient opportunity to go to a safe place; isn't that correct?

A. That's correct.

Q. And any warning device which is understood by the blaster and the other employees and which provides that type of notice would be adequate under the statute, would it not?

A. Would you repeat that again, please?

Q. Any warning, technique or procedure which is understood by the blaster and by the employees on the premises and which gives the employees that notice so that they can go to a safe area would be sufficient under the statute, would it not?

A. In this case, it was posted, and I would think that the signal given could be misleading.

Q. But do you know whether or not Mr. Alvatrona relied upon the sign?

A. That I couldn't say.

Q. You have no way of knowing that one way or the other?

A. No.

Q. You have no way of knowing what Mr. Alvatrona understood by the motion from Mr. Bloom?

A. I have no way of knowing that either.

A. Mr. Bloom stated that he motioned Mr. Alvatrona to shut down.

Q. You were satisfied at that point that those employees at Doan understood that motion to mean he was supposed to shut down because the blast was going to take place?

A. Yes.

Q. That is why you did not feel it necessary to ask Mr. Bloom any further questions about the motion and the meaning of the motion?

A. That's right.

Q. And any warning device or procedure or technique which furnishes an employee with the information the blast is about to take place and sufficient time to find a safe haven does satisfy the statues, does it not?

A. I would say so, yes.

Q. And certainly direct personal knowledge to an employee given to him either over the radio or in person would be sufficient notice?

A. Probably would be, yes.

Q. You do not have any factual basis for any opinion on whether Mr. Alvatrona would be alive today under any different hypothetical circumstances with regard to notice of hypothetical conduct on the part of anyone else who was on that property, do you?

A. Would you repeat that, please.

Q. Surely. Do you have any factual basis for drawing any conclusion as to whether Mr. Alvatrona would be alive today based on any hypothetical actions or conduct by anyone else who was on the Doan Coal Company property on that day in July of 1981?

A. That I wouldn't know.

Q. It is complete speculation?

stated that ten minutes before the blast [illegible] the company radio installed in his loader. He was called by th operator, and told to shut the equipment down. Since the crush radio he motioned and signaled Mr. Alvatrona to shut the crushe The hand signal he used is a standard procedure which everyone He had used them before and he believed Mr. Alvatrona understoo and he shut the crusher down. After he shut down, Mr. Bloom ob Mr. Alvatrona heading in the direction of the scale house, and that he habitually spent most of his time there (Tr. 272-279).

Mr. Bloom stated that it was company policy to warn employ impending blasts personally or over the radio. He confirmed th three airhorn blasts immediately before the blast on the day in but it was his view that such warning sounds cannot be heard ov noise of back-up alarms and loaders (Tr. 281).

On cross-examination, Mr. Bloom stated that he never saw M or any other employees inside the blast area prior to the blast no idea as to why anyone would walk into a blast area "unless you to watch it" (Tr. 284). Mr. Bloom stated that no barrier w road coming onto mine property, that he had never seen such a b in the past, and he did not believe it possible that Mr. Alvatr serving as a guard the day of the blast (Tr. 286). He confirme five to seven minutes, and at most 10 minutes, elapsed between he received the radio information about the blast and the actua (Tr. 286). He confirmed that the "blow out" surprised him beca was more fly rock than usual. He had no contact with the blast to the shot, and when he saw Mr. Martz driving into the area h him and told him to shut his truck down by means of a hand sign this was before the warning signals were sounded (Tr. 288).

In response to further questions, Mr. Bloom stated that h inside his loader where it was parked and that he did not cons to be in danger. Since he saw Mr. Alvatrona heading for the s he assumed that is where he was going and did not speak to him (Tr. 291). He believed he was safe, and if he observed fly ro over him after the blast, he would not stay in the same locati next time a blast was fired (Tr. 293). Other similar shots ha fired the same day of the accident (Tr. 294). He had never kn Mr. Alvatrona to go and observe shots in the past, and he did what he was doing the day he was killed since "after he got pa a certain point I couldn't see him" (Tr. 296).

Alvin Mitchell, testified that he is an engineer and safety direct
Doan Coal Company, and was so employed at the time of the accident.
onfirmed that the company has a qualified training program, that he
harge of it and is certified to conduct training, and that he train
Alvatrona. He identified exhibit R-1 as a copy of Mr. Alvatrona's
ining certificate, and indicated that he was trained in hazards
ntification as well as in the use and danger of explosives (Tr. 312)
Mitchell testified as to the company's blasting signal policy and
cedure, and confirmed that there are 33 mobile radio units at the
e on most of the equipment. He also confirmed that he was present
ing the accident investigation, and stated that the distance from th
t area to where Mr. Alvatrona's body was found was 260 feet, and he
icated the normal route he would have taken to get to the scale hous
m the stock pile area.

Mr. Mitchell confirmed that the location of the blast where the di
es were at was at the edge of the pit and that Mr. Alvatrona would
e no reason to be in the area where he was found (Tr. 319). Mr. Mi
ted that part of Mr. Alvatrona's training included procedures conce
shutting down of equipment and blasting signals (Tr. 322). Mr. Mi
o indicated that the procedure followed by Mr. Bloom in notifying
Alvatrona about the blast, as well as the mine procedure for notif
er employees was normal and no different from any other day (Tr. 32
Mitchell identified several photographs depicting the spoil pile
re it is believed Mr. Alvatrona was sitting at the time of the blas
the general scale house area (Tr. 323-328; exhibits AP-1 through A

Mr. Mitchell testified that he was at the blast scene after the
ident, and in his opinion had Mr. Lucas been looking in the directi
the spoil pile he could have seen Mr. Alvatrona (Tr. 333). Mr. Mit
ntified exhibit G-7(k) as a photograph of a typical blasting signal
n posted at the entrance to the mine property, but could not say wh
t particular sign was posted on the day of the blast. However, he
icate that a similar sign was posted, and that the men are instruct
listen for the signals depicted on the sign (Tr. 334). He did not
ther the mine road is normally barricaded because he is not at the
e when blasting takes place (Tr. 335). Mr. Mitchell stated further
t the spoil pile was 13 to 14 feet high, and that Mr. Alvatrona's
k would not require his presence there (Tr. 338).

Mr. Mitchell considered the scal house, the drill truck, and the
crusher to be suitable blasting shelters (Tr. 343). Mr. Mitchell
ceded that Mr. Lucas may not have followed the literal blasting

pounds of explosives that he would have ordered men to be remove
feet since there was a chance that flyrock would reach that dist
However, the blaster was 300 feet away and he believed this was
(Tr. 362).

David G. Doan, testified that he is the managing owner of I
Company and that he has been in the coal business since 1944. M
stated that all mine equipment except for bulldozers are equippe
radios and that everyone on the site is given actual notice, eit
personally or by radio, before a blast is fired. Everyone on th
notified to shut down and await the shot regardless of how far a
the actual blast they are located. Mr. Doan confirmed that he i
experienced in the use of explosives, and as far as he is concer
use of air horns is not effective because of the roar of the equ
and that is why mine procedure calls for the shut down of all eq
before a blast and personal notification given to all employees
371).

Mr. Doan stated that the scale house was a secure area and
"there is no way that a rock could go through the scale house"
He also indicated that the crusher is made of structural steel a
make "a wonderful shelter" (Tr. 372), and that since he has beer
coal business he has never had any problems with notifying emplo
clearning out blast areas. He confirmed that the accident in qu
was his first fatality, and that there have never been any explo
related injuries at the site since he has been in business (Tr.
With regard to the signals given and the definition of "blast ar
Mr. Doan testified as follows (Tr. 376-377):

> Q. Mr. Doan, you mentioned that the victim was personally told that there was going to be a blast.
>
> A. Well, he was personally notified with the signals
>
> Q. There is a distinction between personally told and personally signaled; would you not agree?
>
> A. Well, that depends on how fine a little thin line you want to draw. He personally understood the signa because he had been taking them and giving them up until then. It was nothing new that he got. The sig that he got that day were the same as he always got.
>
> Q. Do you mean he never got them before on the radio

to it that I can understand from what I have listened to.

In Powder Company's Testimony

Jeffrey A. Lucas confirmed that he is a licensed blaster and holds llege B.S. degree in mathematics. He stated that the warning signals before and during the blast in question consisted of radio contacts to fifteen minutes before the blast and three signals immediately r to the blast, and no one ever requested that this be changed. To knowledge he has never known of any Doan employee to ignore the signa he had no reason to believe that anyone did not understand them. elieved he was in a safe location on the day of the incident, that shot was laid out to go away from where he and the crew were located, that he had previously made five to six previous shots at that locati 400, 412). There were no blowouts from the previous shots, and had one in question gone the same as the others no one would have been anger 100 feet from the shot. There was nothing unusual about the siz he shot in question, and in relation to the others they were all the , including the amount of explosive used (Tr. 402).

Mr. Lucas stated that he believed his crew was in a safe location he also believed that the scale house was safe because it was further him and away from the shot location. He confirmed that he was looki he blast area and he indicated that he prefers not to be under a truc use he wants to view the blast and can always move away from any ock. On the day in question, he never expected the flyrock to come ar as it did and he was not aware that anyone was on the spoil bank saw no one in the area that he considered to be the blast area (Tr. 4 r the incident, MSHA suggested to him that he move further back, seek sort of protection, and suggested a 500 foot distance as a guideline ersonally would not like to be 500 feet from a shot and would prefer e somewhere where he can see it (Tr. 409).

Mr. Lucas testified that from where he was standing at the time the t was set off he was unable to see the crusher because it was behind coal stock pile and there was line of trees in the area. He personal

houses to be identified on the form (Tr. [illegible]).

Mr. Lucas explained the characteristics of a "blowout", and confirmed that he checked all of the holes for potential signs of an incident. He explained the wiring and detonation of the shot, confirmed that since the accident he has changed his signaling pr to comply with the blast warning sign which is on the property, b the radio signal system is also being used (Tr. 441-446).

Ray Thrush, testified that he has been employed with Austin for approximately eleven years as a sales and technical represent He confirmed that he has been a licensed blaster since 1967 and l in the States of Pennsylvania, Maryland, and West Virginia. He a indicated that he is an MSHA certified surface and underground bl instructor. Mr. Thrush confirmed that he has been going to Doan property since 1971, and prior to his employment with Austin Powd was on the site doing blasting work with the National Powder Comp He also indicated that prior to July 30, 1981, and before radios obtained, the warning signals which were used were "personal cont all machinery". Since that time radio contact is used, and the blasts on an air horn was also used as a signal within the past years and before July 30, 1981 (Tr. 454-458).

Mr. Thrush confirmed that he was at the mine the day after during the investigation and was familiar with where Mr. Lucas wa positioned at the time of the blast. In his opinion, Mr. Lucas a safe distance, and he indicated that based on the number of ho the amount of the powder used, he could have been 100 feet close still been safe. Mr. Thrush described the 24 charged holes as a one", and he also indicated that as a blaster, he would like to so that he can observe a shot. He also indicated that during hi with Inspector Bixler, Mr. Bixler indicated to him that he could anyghing wrong with what Mr. Lucas had done (Tr. 458-462).

Mr. Thrush indicated that he was present when MSHA Inspecto terminated the citation and he indicated that he did so by comin mine to observe the manner in which another shot was fired. The in front of the spoil pile and the crew and the inspector were b equipment trailer when the blast was fired. Inspector Zangary i that this was sufficient coverage. However, the shot could not and after the blast two boys on trailbikes came out of the nearb and Mr. Thrush stated that when he asked Mr. Zangary how he woul the event if the boys had ventured into the shot area and been k Mr. Zangary replied that it would have an "accident" (Tr. 464).

200 feet from the blast site, and that would be the area he would have been concerned about keeping secured (Tr. 471). Mr. Thrush confirmed that he has had some 30 years experience working in coal mines and gas fields "shooting gas and oil wells and stripping" (Tr. 472).

The Jurisdictional Question

Apart from any factual disputes concerning the alleged violations, there is no jurisdictional dispute between MSHA and the respondent Doan Coal Company. Doan Coal is a Pennsylvania strip mine operator and it concedes that its mining operations are subject to the Act and to MSHA's enforcement jurisdiction. The jurisdictional dispute in this case is between MSHA and the respondent Austin Powder Company.

The Nature of Austin Powder's Business

In its posthearing brief, Austin Powder states that it is a manufa and supplier of explosives to a number of different industries, includi the coal mine industry (Tr. 466, 507). To ensure the safe use of its products and safety of both its customers and the general public, Aust Powder, at no charge, provides technical expertise and advice to those customers who desire such assistance (Tr. 465, 476). As one component of the assistance which is available to the customer, Austin Powder has licensed blasters who may be loaned to a customer upon request, but Austin Powder is not obligated to provide a blaster to a customer, nor is there any guarantee that at any particular time a blaster will be available (Tr. 508). Austin Powder maintains that this situation must be contrasted with that of a contract blaster who enters into a contra with an individual to perform blasting services. In such arrangements the contract blaster is contractually obligated to provide blasting services and is paid for such services. In contrast, there is no obligation whatsoever upon Austin Powder to provide blasting services for customers, and if a blaster is made available no charge is paid fo such service (Tr. 465-466).

Austin Powder maintains that in instances where a customer desire to utilize Austin Powder's technical expertise, the parties enter into a service agreement. Under the agreement, Austin Powder agrees to len the customer the temporary use of Austin Powder's employees and equipm free of charge (Tr. 465, 476). In return, Austin Powder states that the customer agrees that while it is using such employees and equipmen the employees are under the sole supervision and control of the custom and that all work and services performed by such individuals are at th sole risk and responsibility of the customer.

Austin Powder states that on January 19, 1981, it entered into a

decided when to blast and had the right to control the details o
blast (Tr. 410-411).

Whether Austin Powder is an "Operator" within the Meaning of the

Austin Powder maintains that before MSHA can assert jurisdi
in this matter it must establish that Austin Powder is an "opera
within the meaning of 30 U.S.C. 802(d). Austin Powder states th
is abundantly clear, and that MSHA has conceded as much, that Au
Powder does not own, lease, operate, control or supervise a coal
Although MSHA does allege that Austin Powder was an independent
performing blasting services for Doal Coal on the day in questio
such was subject to MSHA's jurisdiction, Austin Powder asserts t
MSHA's position is wholly untenable because the clear evidence e
Austin Powder was not an independent contractor performing blast

Austin Powder argues that before it can be found to be an i
contractor under the Act, MSHA must establish the existence of a
between Austin Powder and Doan Coal whereby Austin Powder contra
provide services for Doan Coal. Austin Powder maintains that MS
failed to introduce any evidence that such a contract existed.
it states that MSHA has not even tried to establish the existenc
a contract.

Austin Powder maintains that it is not, and was not a contr
has no drilling capacity, and does not contract blasting service
it is a manufacturer and supplier of explosives to numerous indu
including the coal industry, and that it entered into a sales ag
with Doan Coal in which Doan Coal purchased a quantity of explos
To ensure the safe use of its products, Austin Powder, pursuant
service agreement voluntarily entered into by the parties, allow
Coal to draw upon its technical expertise to assist in detonatin
explosives. The agreement is a legally binding, valid document
Austin Powder loaned Doal Coal its employees for Doan Coal's use
New River Crushed Stone v. Austin Powder, 210 S.E.2d 285 (N.C. 1
Fralin v. American Cyanamid Co., 239 F. Supp. 178 (W.D. Va. 1965
Portland Cement Co. v. DuPont, 118 F. Supp. 603 (D. Ore. 1953);
Powder Co. v. Campbell & Sons Co., 144 Atl. 510 (Md. App. 1929).
was made for this technical expertise (A.P. Exh. No. 11; Tr. 466
Moreover, Austin Powder states that it had no obligation under t
agreement to provide such technical service, and if its people w
available, Doan Coal could not require that Austin Powder furnis
In short, Austin Powder maintains that the loaning of its employ
Doan Coal to ensure safe use of its product was a gratuity and n
by contract.

as not subject to MSHA's jurisdiction.

Austin Powder argues that on the facts of this case, those individ who allegedly committed the cited violations were, as a matter of law, oan Coal Company employees, and not employees of Austin Powder. In su f this argument, Austin Powder argues that the express terms of the se greement clearly and unambiguously state that while the Blaster Lucas nd his crew were on Doan Coal property they were for all intents and urposes Doan Coal employees. Doan Coal had the sole right to supervis nd control the activities of Lucas and his crew, and Doan Coal perform ll the drilling and decided how many holes to drill, the depth of the oles and the location of the holes (Tr. 410). Doan Coal had the right o supervise the details of the blasters' work and when a question aros he blaster looked to Doan Coal for direction (Tr. 411).

Austin Powder asserts further that Courts have long held that the aramount consideration in determining whether an independent contracto n employer-employee relationship exists is who has the right to contro nd supervise the details of the work activity. See e.g. Joint Council f Teamsters No. 42 v. N.L.R.B., 450 F.2d 1322 (D.C. Cir. 1971); Assoc. ndependent Owner-Operators, Inc. v. N.L.R.B., 407 F.2d 1383 (9th Cir. n this case, given the service agreement's clear language and the actu ncontradicted testimony of the witnesses, Austin Powder concludes that t is clear that Lucas and his crew were, as a matter of law, Doan Coal employees and accordingly, Austin Powder cannot be held subject to MSHA's jurisdiction.

Finally, Austin Powder maintains that MSHA's latest policy memoran concerning the identification of independent contractors under the Act makes it clear that Austin Powder falls outside the scope of an "operat as defined by the Act. Under this memorandum, before a company will be considered an independent contractor for the purposes of the Act, it mu inter alia, perform both drilling and blasting services, the precise se which a contract blaster provides. Austin Powder notes that it is sign that MSHA chose the conjunctive in this subsection, but in all other subsections where more than one factor was listed chose the disjunctive thereby clearly intending to include the definition of an independent contractor only to those companies which provide both drilling and blas services. Since it is not a contract blaster, Austin Powder concludes that it falls outside of MSHA's own criteria for determining whether an individual is an independent contractor and is not subject to MSHA's jurisdiction.

the opposite conclusion. Namely, that the blaster, Jeffrey Lucas, was a full time employee of Austin Powder, whose services were paid for by Austin Powder as part of the price from selling explosives to mining companies.

MSHA argues that as a private business, Austin Powder has a right to conduct its business in a manner which it finds the most convenient in accordance with general industry practice, and that MSHA has no objection to "service contracts" per se, between companies providing services to coal mining companies, like Doan Coal. However, MSHA maintains that it should be obvious that the Secretary of Labor and the Federal Mine Safety and Health Review Commission are not bound to accept, on face value, the so called "gratuitous nature" of a service contract, especially if its intended purpose is to limit liabil which would otherwise be imposed under the Act. MSHA asserts that to follow Austin Powder's viewpoints with regard to its attempt to award liability in this matter would amount to a total disregard of the Congressional intent expressed in the 1977 Mine Act, of placing liabili for violations according to actual conduct.

MSHA maintains that a review of the service contract entered into between Austin Powder and Doan Coal indicates that it has little to do with any actual services performed by Austin Powder, and that it is merely an indemnification agreement which Austin Powder requires its customers to sign prior to allowing them to use its blasting services. MSHA states that the customer is really not given any choice and is required to assume all the risks and responsibilities inherent in an extremely dangerous occupation.

MSHA points to the fact that Jeffrey Lucas, the blaster, testified that he considered himself a full time employee of Austin Powder, was never told anything to the contrary, believed that he was in charge of the blasting area, and acknowledged that it was up to him to make sure that everyone in the blasting zone was notified (Tr. 29). It was his function to check the wiring for the explosives prior to the blast and notify members of his crew when to give the signal that a blast was goi to occur, after he checked the pit area visually.

MSHA also points out that Mr. Lucas' presence at the Doan Strip Mi was long term and continuous, and that Mr. Lucas testified that at leas 50% of his blasting work was at the Doan Strip Mine and he was generall on the property four to five times a week for up to five hours a day. Also, Mr. Lucas usually brought a crew of men with him to assist them with the blasting operations and proceeded directly to the pit area without waiting for any instructions from the supervisory personnel employed by Doan Coal. Under the circumstances, MSHA submits that

F.2d 253 (1965), and Conco, Inc. v. Andrews Van Lines, Inc., 526 F.S
720 (1981).

Findings and Conclusions

The Jurisdictional Question

Section 3(d) of the Act defines "operator" as "any owner, lessee or other person who operates, controls, or supervisors a coal or othe mine or any independent contractor performing services or constructio at such mine;" (emphasis added).

Section 3(g) defines "miner" as "any individual working in a coa or other mine", and section 3(h)(1) defines "coal or other mine" as including, inter alis, "lands, excavations, structures, facilities, equipment, machines, tools, or other property * * used in, or to be u in * * * the work of extracting such minerals from their natural depo * * *".

The legislative history of the Act clearly contemplates that jurisdictional doubts be resolved in favor of Mine Act jurisdiction. report of the Senate Committee on Human Resources states:

> The Committee notes that there may be a need to resolve jurisdictional conflicts, but it is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possible interpretation, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.

S. Rep. 95-181, 95th Cong., 1st Sess. (May 16, 1977) at 14: Legi History of the Mine Safety and Health Act, Committee Print at 602 (he after cited as Leg. Hist.).

them to come back another time. Doan has also used ... and if Doan had a preference it may determine the direction that it wi the blast to go. While Doan may prefer that the blast be directed awa from equipment, the direction of the blast would be left to the blaste (Tr. 340-342). Mr. Mitchell stated that during his three and one-half years at the mine Austin Powder conducted 90 percent of the blasting which was done at the mine site (Tr. 353). The only thing he is requi to do insofar as Austin Powder's employees are concerned is to insure that they have signed the hazard recognition sheet before they enter t mine site (Tr. 355).

Blaster Jeffrey Lucas confirmed that Doan Coal Company determines the number of blast holes to be drilled, as well as the diameter and d of the holes. Doan Coal also determines when the holes are to be load and then notifies Austin Powder. Should a hole be plugged, Austin Pow will attempt to take care of the problem, but "if there is anything ou of the ordinary Doan Coal will tell us how they want things done" (Tr.

Mr. Lucas testified that he considered himself to be an employee Austin Powder Company and has never considered himself to be employed by Doan Coal (Tr. 416). None of his supervisors have ever advised him the contrary, and he considered the services he was performing at the to be an important part of the mining process. He conceded that he was at the Doan site performing a service, but he denied that Doan Coa paid for his services. He explained this by stating that Doan buys powder from Austin and he makes up the billings for the shots and ther is no specific charge for his services. He had no knowledge that the charges for his services, which are paid for by Austin, are included in the price that Doan pays for the powder which is used (Tr. 418).

Austin Powder's technical representative Ray Thrush identified exhibit AP-11 as the "service agreement" between Austin Powder and Doa Coal, and he confirmed that he signed it on behalf of Austin Powder, and that it was the only agreement between the two companies. */ He denied that Austin Powder is a "contract blaster", and he defined

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*/ A copy of the "Service Agreement" is included herein as an attachment to this decision, and the document is incorporated herein b reference.

ndicated that as part of the selling of the powder, Austin Powder rovides its technical experience or advice in detonating the powder nich it sells, and the electronic detonating devices are owned by Austi owder (Tr. 466-468). He also confirmed that the blaster is responsible or the safety of the blast (Tr. 468).

Mr. Thrush could not state how much business Austin Powder did with oan Coal in 1981, and he had no knowledge as to any prior business volu etween the two companies. He indicated that Austin Powder probably as no more than ten blasters working in the State of Pennsylvania, and hat customers are not charged for their services. When asked about the ost of trucks and blasting equipment, he answered "the same setup" Tr. 476). When asked whether these costs are passed on to the customer s part of the purchase price of the dynamite he replied "I guess" and that is very possible" (Tr. 477).

With regard to the service agreement, Mr. Thrush stated that a new ne is executed every year, and that it is not done on a job-by-job asis. The services performed under the agreement are on a continuing asis for a year (Tr. 477). Mr. Thrush indicated that when he worked or the National Powder Company, there were no such service agreements n effect, but he did not know why "because I was not involved" (Tr. 478 r. Thrush confirmed that the Austin Powder agreement is signed every ear on the advice of the company's counsel (Tr. 479).

Contrary to Mr. Thrush's testimony that his previous employer did ot have a "service contract" with its customers, Austin Powder's counse sserted that "virtually all" of its competitors have such contracts nd that "it is an industry practice" (Tr. 512). Counsel also contended hat when the blaster, Mr. Lucas, goes to Doan Coal's property to perfor is blasting chores under the service agreement he is Doan Coal Company' mployee (Tr. 513-514). However, counsel conceded that Austin Powder till pays all of Mr. Lucas' regular benefits, such as health coverage or his family (Tr. 514). With regard to the right of Doan Coal to upervise Mr. Lucas, Austin Powder's counsel took the position that mine perator Doan believed that he may exercise supervision or control over

there looking over his shoulder as he [illegible]
the holes and wires up the shots, is he?

MR. WALL: I am not aware that he commonly does. He could if he wanted to.

ADMINISTRATIVE LAW JUDGE KOUTRAS: Do you mean that he could supervise Mr. Lucas in the manner he wires up and loads the shots and puts them off?

MR. WALL: He certainly could.

ADMINISTRATIVE LAW JUDGE KOUTRAS: Why doesn't Mr. D do the blasting himself? He could save a little bit of money.

MR. WALL: Mr. Doan does not want to do the blasting anymore. He has other things to do. He started out with a small operation. Now he has some ten pits. has a larger operation and has other people doing lo things that he used to do himself.

ADMINISTRATIVE LAW JUDGE KOUTRAS: Mr. Wall, if you with regard to the activities of Austin Powder, is t common arrangement in strip mining in this area to h the manufacturer of the explosives do the actual bla for the mine operator?

MR. WALL: It is not at all unusual, no. I cannot s that it is the normal practice in every instance. I I am not familiar with the practices here. But I kn that most of the larger manufacturers also have simi arrangements.

ADMINISTRATIVE LAW JUDGE KOUTRAS: Again, I am not m light of this service agreement. In the section whe it says Austin Powder Company is not engaged in blas work. How can one say that Austin Powder is not eng in blasting work when, in fact, they set the wheels motion? They dispatch three people when the call co Three people, vehicles, equipment and the product co They charge the holes, the blast goes off. Now, yo say that is not blasting? Is that blasting work, se the charge and blasting?

ADMINISTRATIVE LAW JUDGE KOUTRAS: Under this service agreement the blasting work is performed by Doan not Austin Powder?

MR. WALL: That is correct. It is an arrangement which is made in our industry as well. It is not uncommon for example, for heavy equipment with its operator to be loaned to another employer. A crane, for example, could be loaned to some particular employer with its operator for use during a particular period of time.

ADMINISTRATIVE LAW JUDGE KOUTRAS: Yes, but usually in those kinds of arrangements they pay for them, do they not? In this case had MSHA opted not to cite Austin Powder as a respondent in this case and decided only to go against Doan Coal Company and issued the citations only to Doan and sought the maximum civil penalties in this case on the theory that Mr. Lucas as an employee of Doan Coal Company was negligent and, therefore, that negligence is imputed to his employer Doan Coal Company. How do you think Mr. Hanak sitting next to you would be arguing in that case?

MR. WALL: I cannot speak to that.

ADMINISTRATIVE LAW JUDGE KOUTRAS: Mr. Hanak, does your client realize that this service agreement, when those people and equipment come in the Government would consider those people to be his employees from now on?

MR. HANAK: We have never thought of the impact as far as any criminal action like here.

During the course of the hearing, Austin Powder's counsel indicated the company sells explosives "in about 37 states" (Tr. 507). He indicated that in terms of sales volume, Austin Powder ranks second ird in terms of national sales volume, but emphasized the fact that are only "a handfull of explosives manufacturers" (Tr. 507).

During the hearing, Doan Coal's counsel took the position that in vent that it is decided that Austin Powder is not subject to MSHA's cement jurisdiction and are found not to be liable because of the ce agreement, this would serve as a basis for immediately imputing n Powder's liability to Doan Coal simply because of the agreement 479). Austin Powder's response was that "Austin is not within the

utilize experts in the field of drilling or blasting (Tr. 309). summarizing his position concerning the blaster's "independent status in this case, Austin Powder's counsel argued as follows

> MR. WALL: There are two reasons. One is that under the service agreement it is the intention of the parties that Mr. Lucas and others be loan servants in essence of Doan Coal. Loan servants is a well establ common law concept. It has been accepted in the indu in every state. The normal detriment of the status o particular individual is the intention of the party a time. That intention is clearly explained here in th document. The intention of the parties is that Mr. L be, for lawful purposes, freed as an employee of Doan Coal Company at the time so that Austin Powder as a corporate entity would not have liability.
>
> Mr. Lucas while at Doan Coal Company is under th control of Doan Coal Company. When Mr. Lucas is at a mine operator's property Austin Powder does not have control over those operations. It does not have insu those operations. It does not anticipate having liab for those operations and seeks to be protected from t willing to furnish that service to a customer in exch for the customer's agreement to be responsible for an of the actions and to be responsible for that employe while he is on the property.
>
> The second factor is that there are very few gui in the statute for the regulation for what constitute operator. One goes back to the history of the 1977 Amendment of the Bituminous Coal Association's argume Because they were upset with construction companies w were coming on to their property and committing viola for which the mine operators were held responsible. looks at the limited guideline that is available and limited guideline is in the regulation. The regulato definition of an operator there is that there is a re ment that there be a contract for services.
>
> In this instance there is no such contract where Austin Powder is contractually bound to provide any services. Hence, within the strict technical means

there is a charge for those people and they come in on a contract basis and are paid for this. This is not an arrangement of that type.

take note of the fact that MSHA considered Austin Powder as an endent contractor" subject to the Act, and in fact assigned Austin a contractor Identification Number. While the assignment of such ntification number does not ipso factor bestow "contractor" status company, I find nothing in the record to suggest that Austin has protested MSHA's characterization of its activities in this MSHA's Independent Contractor regulations found in Part 45, 30, Code of Federal Regulations, section 45.1 et seq., defines lependent contractor" as follows at section 45.2(c):

> "Independent Contractor" means any person, partnership, corporation, subsidiary of a corporation, firm, association or other organization that contracts to perform services or construction at a mine; * * *

though Part 41, of the regulations dealing with the application requirements of section 109(d) of the Act that mine operators certain "legal identity" information to MSHA does not apparently "independent contractors", Part 45 does. Further, other regulatory ements such as those found in Parts 48 and 50, Title 30, Code of Regulations, require contractors to comply with certain training ordkeeping requirements of the law. As a matter of fact, in this stin Powder's technical representative Ray Thrusy is an MSHA ed blasting instructor, and the blaster Lucas testified that he rly performed blasting at Doan's mine. This being the case, I that Mr. Lucas is "MSHA certified" to perform the duties required ster's under Part 77, Title 30, Code of Federal Regulations, and that rush also has MSHA's stamp of approval to train blaster's in nce with MSHA's requirements.

addition to the foregoing, I take note of the fact that in response Order directing MSHA to submit any evidence concerning Austin Powder's of prior violations, MSHA submitted a copy of a Decision and Order e Kennedy on November 26, 1980, approving a settlement between Powder and MSHA providing for the payment of $20,000, for five ons served on Austin Powder in 1979 for five violations of several ry blasting standards found in Part 56, Title 30, Code of Federal ions. Although a copy of the "compromise settlement agreement" d by Austin Powder's counsel Wall and MSHA's counsel contains a

Although the aforesaid "settlement agreement" also con
statement that it is the "intent of the parties" that the s
approved by Judge Kennedy shall not be "offered, disclosed,
admitted in evidence" in future litigation involving the pa
for the limited purpose of showing prior history by Austin
not bound by the parties intent in that case. It seems to
payment of $20,000, by a company who vigorously disclaims i
by the Act is somewhat contradictory. If Austin Powder is
to the Act as a mine operator or independent contractor, th
of prior history is totally irrelevant. Further, in at lea
concerning the approval by a judge of a settlement entered
parties, the Commission has not recognized the use of "disc
or "exculpatory language" in its review of approval or disa
settlements in such settlement negotiations when it appears
of such language is for the purpose of insulating an operat
enforcement jurisdiction. See: MSHA v. Amax Lead Company
FMSHRC 975 (1982). See also, Co-Op Mining Company, 2 FMSHR
(1980), where the Commission rejected a Judge's approval of
when it appeared that no violation of any mandatory standar

In my view, Austin Powder is more than a mere sales co
blasting powder and explosives used in the removal of overl
mine operators for the express purpose of mining the coal v
immediately below of the surface. Austin Powder is direct
in the coal removal process when it provides the blaster,
and trained personnel to do the actual blasting and removal
Under these circumstances, Austin Powder is an independent
within the reach and jurisdiction of the 1977 Mine Act. Au
different from other independent contractors who are retain
companies for the express purpose of utilizing their exper
experience in different phases of the coal extraction proce
a mine operator may retain the services of a contractor to
or to construct other necessary facilities such as cleanin
tipples, or even bathhouses, or to perform certain drillin
excavation work. As a matter of law, these contractors are
under the Mine Act's definition. On the facts of the inst
the citations issued to Austin Powder described conditions
by an employee of Austin Powder relating to the work that
was engaged to perform. As a matter of fact, Austin Powde
involved in the abatement of the citations attributed to i
violations.

Notwithstanding Mr. Thrush's "loss of memory" concern
of who absorbs the costs of the services provided by the b

if Austin gave its powder away I would still conclude that it was enga in provided a blasting service, albeit gratuitously.

It seems clear to me from the record in this case, that contrary to any intent on the part of the parties as to the status of the blast Lucas, he is in fact an employee of the Austin Powder Company. It is also clear to me that on the day of the accident in question Mr. Lucas was performing an important service at the Doan Mine site and that this service was directly related to the extraction of coal. While it may be true that anyone on Doan's mine property is subject to the "con of the mine owner and operator, this is no different from the "control that any land owner of businessman exercises over persons who come ont to his property or enter his business establishment. The critical que here is whether Doan Coal exercises supervision and control over Austi Powder's blaster while the blaster is performing his blasting duties.

I conclude and find that while engaged in the work of the actual blasting and removal of the overburden on the day of the accident, the blaster, Mr. Lucas, was performing his duties as a "miner" as defined section 3(g) of the Act, that he was not under the control of Doan Coa Company while performing these duties, but rather, acted as an employe and agent of the Austin Powder Company. In addition, I also find and conclude that as the licensed blaster Mr. Lucas acted independently from any direct supervision or control by Doan Coal Company, and that in his capacity as the licensed blaster he exercised direct supervisio and control over his crew, all of whom are in the employ of Austin Pow and that he also had direct control of the trucks and equipment owned by Austin Powder and used in the blasting process. Further, Mr. Lucas had full responsibility for the blast, including the charging of the holes, and the final detonation. He was also responsible for insuring the safety of his crew and other miners, and he issued the order to sh down all mine equipment immediately preceding the blast. As a matter of fact, Doan's own safety director Mitchell testified that once the blasting crew comes onto mine property, the only contact he has with t is to make sure that they have signed a "hazard recognition" form.

After careful consideration of all of the evidence and testimony adduced in this case with respect to the jurisdictional question, incl the arguments advanced by the parties in support of their respective positions, I conclude and find that for the purposes of this proceedi Austin Powder Company is an independent contractor who was performing blasting services at the mine site in question on the day of the acci and as such is, as a matter of law and fact an "operator" within the of the Act and is therefore subject to the Act as well as to MSHA's enforcement jurisdiction. I reject Austin Powder's "common law loan

that Austin Powder did in fact provide rather extensive and conti
services for Doan Coal Company, and that the services provided we
directly related to the mining of coal. Austin's attempts to lir
liability through the use of a "service agreement" may be recogni
as valid as between the parties, but I reject it as a means of al
Austin from any responsibility or accountability under the Mine A
I accept MSHA's arguments that acceptance of Austin Powder's atte
to limit its liability by means of the "service contract" would a
to a total disregard of the Congressional intent expressed in the
of placing liability for violations according to actual conduct,
would be contrary to public policy.

Fact of Violation - Citation No. 1041345, August 6, 1981, 30 CFR

Citation No. 1041345 was issued because the inspector belie
Mr. Lucas failed to give "a proper warning according to the post
ments", and that his asserted failure to do so constituted a vio
section 77.1303(h). The first sentence of this standard states
"Ample warning shall be given before blasts are fired".

The requirement stated in section 77.1303(h) is that an amp
be given before a shot is fired. MSHA's position in this case a
to be that by failing to follow the blasting warning signal syst
was posted on a sign on the road coming onto the mine site, Mr.
failed to give the kind of warning required by the standard. In
MSHA contends that the signal system posted on the sign was requ
be followed by Mr. Lucas, and when he failed to follow it he vio
section 77.1303(h). A short answer to this argument is that the
itself does not provide for any specific signals to be given. I
to me that since blasting and the use of explosives is inherentl
MSHA should as a minimum promulgate a standard that makes it abs
clear as to what is required. The use of such broad language as
warnings" leaves much to the imagination, and the instant case i
example of this. MSHA's counsel conceded during the hearing tha
cited regulation does not require the use of any particular sign
the posting of signs, barricades, or road guards for the purpose
persons about blasting.

MSHA's counsel conceded that there is no specific regulator
as to what constitutes a "proper" or "ample" warning signal prio
detonation of any shot (Tr. 42). His position is that if a sign
sufficient warning of a pending blast and gives the mine operato
contractor's employees time to remove themselves from a blast ar
that sign is followed, then ample warning is given (Tr. 43). Gi

that the question as to what constitutes an "ample warning" within the meaning of the standard "has to be determined by the facts" (Tr. 78). Further, since the standard itself does not require any particular for of warning such as signs, flags, barricades, or the sounding of horns, MSHA's arguments that the blaster was required to follow the signal sy osted on a sign which was located on a mine road leading onto the pro is rejected.

MSHA's counsel conceded that there is no requirement for the use blast warning signs, and there is no requirement that such a sign be osted on the mine roadway (Tr. 451-452). As a matter of fact, the si was on Doan's property and which has been referred to in this case was in fact a sign approved or furnished by the Office of Surface Mining (U.S. Department of the Interior (Tr. 450). However, counsel took the position that if the sign is posted, it becomes the blast warning plan and the operator should follow it (Tr. 452). Absent any showing that the mine operator or contractor in this case were required by any MSHA standard to adopt a signal system and post it on such a sign, I cannot conclude that Mr. Lucas' failure to do so ipso facto constitutes a violation of the warning requirements of the cited regulation. MSHA has conceded as much when it agreed that the question of what constitu an "ample warning" has to be determined by the facts of any given case Further, I believe that the question as to whether any blasting warnin are "proper", as charged in the citation in question, is a highly subj matter which is not even addressed by the regulatory language in quest What may be "proper" to an experienced and licensed blaster who is at the blast site supervising a shot, may not be "proper" in the judgment of an inspector who is called upon (in hindsight) to render a judgment after an accident such as the one which occurred in this case.

In a case decided by Judge Broderick on October 13, 1981, MSHA v. Domtar Industries, Inc., 3 FMSHRC 2345 (1981), a salt mine operato was charged with a violation of section 57.6-175, an underground blast regulation, the first sentence of which is identical to the first sent of section 77.1303(h). In that case two miners were killed in a blast accident, and MSHA charged that the blasting crews had failed "to use effective voice communications between themselves to provide ample war when firing blasts". Although Judge Broderick ruled that since two mi were killed it was obvious that they were not warned, he also observed that oral communication is not the only way to provide "ample warning' compliance with the standard, and he rejected MSHA's suggestions to th contrary.

proceedings presented credible evidence and [illegible]
did all that could reasonably be expected of him on the day in
question to insure that miners were apprised of the fact that the
be a shot or blast, and my reasons for these findings follow.

Mr. Lucas' unrebutted testimony is that five-to-ten minutes
between the time the shot was fired and actually detonated. Duri
time a call was placed over the mine radio communications system
the personnel in the scale house, as well as the mine office, tha
blast would be set off and that all equipment should be shut down
addition, prior to the actual detonation, three 20 second blasts
air horn were sounded, and a siren signal was sounded for at leas
minute prior to the blast.

David Potempa testified that when he arrived on mine propert
five minutes before the blast, he knew there was going to be a bl
because he had seen the blasting crew earlier in the day, and he
directly to the scale house. He also testified that he knew the
would be fired because he heard the warning signals go off five m
before the blast and one minute before it was actually detonated.
believed that he received adequate warning, did not feel that he
danger, and believed that the signals sounded on the day in quest
the same as those posted on the signal sign by the mine roadway.

Crusher operator Albert Bloom testified that ten minutes bef
blast he received notice over the company radio installed in his
and he received the notice from the dragline operator who instruc
to shut the equipment down. Since the crusher where the accident
Alvatrona was working had no radio on it Mr. Bloom signaled him b
to shut the crusher down, and Mr. Alvatrona complied. Mr. Bloom
that the hand signal which he gave to Mr. Alvatrona to shut down
was one that is regularly used and it is a procedure that everyon
and followed. As a matter of fact, he indicated that when he obs
truck driver Martz driving into the area he signaled him to stop
and to shut it down. Once the loader and crusher were shut down,
observed Mr. Alvatrona heading toward the scale house and he assu
that he was going there and did not speak to him further. Mr. Bl
also confirmed that company policy calls for personally advising
employees of an impending blast over the radio communication syst
that five to seven or ten minutes elapsed between the time he rec
the radio notice and the actual blast. He also confirmed that it
normal operating procedure to shut down all equipment as soon as
of a blast is received, and if any of his fellow workers do have

vith the direct personal contact made over the mine radio
ations system was an ample warning within the meaning of the
ntence of section 77.1303(h). Accordingly, respondent Austin
ompany was in compliance with the cited standard and the section
itation No. 1041345 IS VACATED.

Violation - Citation No. 1041342, July 31, 1981, 30 CFR 77.1303(h)

ation No. 1041342 contains two "specifications" which the inspector
ly believed constituted violations of the second sentence of
y safety standard section 77.1303(h). The citation asserts that
persons were not cleared and removed from the blasting area",
hat "suitable blasting shelters were not provided to protect
ngered by concussion or flyrock from blasting". The pertinent
of section 77.1303(h), is as follows:

> All persons shall be cleared and removed from the blasting area unless suitable blasting shelters are provided to protect men endangered by concussion or flyrock from blasting.

ged failure to clear persons from the "blasting area"

term "blasting area" is defined by section 77.2(f) as "the area
sting operations in which concussion or flying material can
ly be expected to cause injury". MSHA's theory in this case seems
at since someone was killed, the victim was obviously not removed
ed from the blasting area. In the circumstances, MSHA argues
ce the standard deals with explosives and blasting, an operator
utely liable for any resulting injuries or deaths. MSHA's theory
ute liability was expounded on by its counsel during the course
loquy from the bench (Tr. 177-182). MSHA's counsel takes the
that since the standard deals with explosives there is absolute
y when the operator fails to remove all persons from the blasting
en though the operator may have made a reasonable physical search
rea prior to blasting. MSHA's position is highlighted by its
o the following question asked by me during the course of the
(Tr. 181):

> ADMINISTRATIVE LAW JUDGE KOUTRAS: If some back packer came on the site, crawled in his sleeping bag and fell asleep; and, during the hoot owl shift, a shot fired off, the mine operator took reasonable steps to remove and to account for all of his people, and every man was taken

> but you are dealing with explosives, and we do think th
> is an absolute liability to remove all persons.

In the Domtar Industries case, supra, MSHA amended the citat
after the action before Judge Broderick was begun to include an a
that the two men who were killed were not cleared and removed fro
endangered by the blast as required by the second sentence of sec
57.6-175. This standard uses the phrase "areas endangered by the
rather than "blasting area". In affirming the violation, Judge B
ruled that "the fact that the miners' bodies were found in that a
irrefutable proof" that all persons were not cleared from the are
endangered by the blast. In a footnote to this ruling, Judge Bro
stated as follows at 3 FMSHRC 2348:

> The Mine Act is generally a strict liability statu
> The language of the cited standard and the wording of
> § 110(a) of the Act make it plain that unforeseeability
> is not a defense to a violation, nor can the operator a
> a violation by placing the blame on a careless employee
> MSHA v. El Paso Rock Quarries, 3 FMSHRC 35 (1981); Hend
> v. Drilling Co., 2 FMSHRC 790 (1980).

In the instant case, MSHA does not cite the Domtar Industrie
or the cases cited by Judge Broderick in support of a strict liab
theory. MSHA's brief simply states that the use of explosives ha
been considered areas where strict liability concepts are specifi
applicable, and concludes that the language of section 77.1303(h)
incorporates the strict liability principals applicable to blasti
its requirements". MSHA argues that the mere fact that the blast v
and blaster and his crew were not clear of the area where flyrock
blast did fall is sufficient to impose liability under section 77

I agree with the position taken by Austin Powder Company in
posthearing arguments that before MSHA can establish that all per
not cleared from the blast area, it has the burden of first estab
what that area is. As correctly pointed out by Austin Powder's c
in his brief, MSHA has attempted to establish the "blast area" in
First, MSHA maintains that the blast area was an area within 500
of the actual blasting location, and it arrives at this distance
and relying on a State of Pennsylvania regulation which only requ
that machinery within 500 feet be shut down and that persons retr
a safe distance.

rea" should be in this case border on fantasy. It seems to me that wh
ne is dealing with regulations concerning explosives and blasting, the
standards sought to be invoked by MSHA should be clearly and precisely
rawn and applied by the inspectors in the field so that they are readi
nderstood by those being regulated, as well as those who have the enfo
esponsibility for insuring compliance. The theories advanced by MSHA
his case are different from those recently advanced in another blastin
ase concerning a mine operator in Pennsylvania, and a discussion of th
ase follows.

On August 25, 1982, I issued a decision in the case of MSHA v. Rockville Mining Company, Docket No. WEVA 82-10. The case concerned an allegation that a Pennsylvania mine operator failed to clear and remove miners from a blasting area in violation of section 77.1304(h). Even though the mine was located in Pennsylvania, MSHA made no mention of an 500 foot requirement or absolute liability, and the inspector who issue the citation, as well as a second inspector who was a qualified MSHA explosives instructor, said absolutely nothing about any 500 foot "safe distance" requirement. In fact, the instructor gave an opinion that ba on the size of the charge in the two bore holes in question, 130 feet was a safe distance, and the inspector who issued the citation rendered an opinion that if all of the holes in question were charged with 800 pounds of explosives each, a safe distance would be 2,000 feet away. I short, in the Rockville Mining case, the question as to what constitute the "blasting area" was dependent on a number of variables, such as the amount of explosives used, the number and depth of the holes which constituted the "shot", the topography, and the expertise of the blaste

On the facts of the instant case, I conclude and find that in orde to establish a violation of the first specification noted in the citati MSHA must establish by a prepondance of the evidence that Austin Powde failed to insure that persons within the "blasting area", as that term is defined by section 77.2(f), were not cleared or removed prior to the last. I reject MSHA's "absolute liability" theory, and I also reject the notion advanced by MSHA that the mere fact that the blast victim and the blaster and his crew were in an area where flyrock fell is suff to impose liability under section 77.1304(h). In order for this standa to make any sense at all, it seems to me that it has to be interpreted rationally and consistently. "Hindsight" and after-the-fact interpreta for the purpose of laying the blame on someone for an unfortunate accid do not in my view advance the interests of safety, particularly when th standard in question is obviously being inconsistently applied and interpreted.

mine operators to follow different
can only lead to chaos are well taken. In my view, if MSHA bel
such state requirements should be followed then it should promu
appropriate standard and say so. Here, although MSHA fixes the
area" by measuring the distance where the farthest rock fell, i
position that 500 feet was a safe distance for people to be. H
only gone 100 feet, that would have fixed the "blasting area",
would probably still insist that miners be cleared to a distanc
feet. I simply cannot accept such contradictory interpretation
applications of the cited standard, and I reject MSHA's "500-fo

While I agree with the argument that the blaster in this c
duty under section 77.1304(h), to locate anyone who happens to
"blasting area" prior to the shot and to insure that he is remo
cleared away, I disagree with MSHA counsel's argument that the
has such a duty even though he may not be able to visually obse
a person prior to the shot (Tr. 34-35). I conclude and find th
of the definition of the term "blasting area", the blaster has
to take reasonable and prudent measures to insure that all pers
cleared and removed from the "blasting area" as reasonably and
determined by him at the time of the shot, and not as determine
experts after the fact.

In the instant case, MSHA conceded that the procedures fol
by the blaster were technically correct. MSHA found nothing wr
manner in which Mr. Lucas loaded, wired, and fired the shot. F
the record here established, at the time the citation was issue
Bixler filled out an "inspector's statement" in which he candid
acknowledged that the accident could not have been predicted an
it resulted from circumstances beyond the operator's control.
filled out a new statement at the direction of his supervisor a
from the solicitor's office made a "lawyer's judgment" that the
could not be defended on its merits. Mr. Bondra candidly admit
the hearing that the sketch of the "blasting area" as shown in
investigation report was a mistake.

Mr. Lucas testified that he and his crew were positioned s
feet from the blast, and he confirmed that in determining what
the "blasting area", he takes into consideration the size of th
the manner in which it is loaded, and the surrounding terrain.
day in question, he determined that the shot would go in the op
direction from where he and his crew were located, but that for
unexplained reason there was a "blowout" which caused the flyro
question.

:ts of the shot or the "blowout". Mr. Bixler conceded that at the he issued his citation he did not take into account Mr. Lucas' opinic 300 feet was a safe distance from the blast, and he also conceded Mr. Lucas did have the safety of his crew in mind prior to the blast.

Mr. Lucas testified that prior to the "blowout" he had made five x other shots using the same amount of explosives and that there othing unusual about those shots. Under the circumstances, he usly had no reason to believe that a "blowout" or flyrock would , and he confirmed that prior to the detonation of the shot, he ed all of the charged holes for potential signs of a "blowout". er, as indicated earlier in my findings concerning the sounding of ning, Mr. Lucas did all that was reasonably possible to alert ersons within the blasting zone of hazard to shut down all equipment o seek shelter.

I conclude and find that Austin Powder Company has established by ponderance of the evidence adduced in this case that prior to the ation of the blast in question, Mr. Lucas acted in a reasonable rudent manner in securing the area, and that he removed himself and rew to a safe distance and to a location which he reasonably believe utside the "blasting area" as defined by section 77.2(f). I also ude and find that Mr. Lucas acted in a reasonable manner in clearing ther persons from the blasting area, and that he did all that could pected of a reasonable and prudent blaster to insure that all person ding the accident victim, were outside the blasting area. Under circumstances, I conclude that MSHA has failed to establish a tion and that portion of Citation No. 1041342, which charges Austin r with failing to remove and clear all persons from the blasting area CATED.

Alleged failure to provide suitable blasting shelters

Citation No. 1041342 also charges Austin Powder with a failure to de suitable blasting shelters. Section 77.1303(h) requires that ersons be cleared and removed from the blasting area unless suitable ing shelters are provided to protect men endangered by concussion or ck from blasting. The regulations do not specify what a "suitable ing shelter" is, and this matter is apparently left to the discretio udgment of the blaster.

MSHA's counsel asserted during the course of the hearing that the ion was issued in part for failure to remove persons from the scale , a location which counsel asserts was inside the blasting area (Tr.

suitable shelter and that the failure to remove persons from the location also constituted a violation of section 77.1303(h).

I take note of the fact that nowhere in the official M investigation compiled by Inspector Bondra is there any men fact that the scale house was not a suitable shelter, or th to remove persons from that location concerned the inspecto I take note of the fact that the conditions or practices de Inspector Bondra on the face of his citation do not even me scale house or anyone in it as part of the alleged violativ or practices. His citation is limited to an assertion that victim was not removed to a safe area, and his conclusions were obviously based on the fact that the accident victim s injuries as a result of being struck by flyrock. Since the issued after the investigation was completed, and since it information which came to the inspector's attention in the that investigation, one would think that the inspector woul included the "scale house theory" in the citation. I belie failure to do so stemmed from the fact that at that point i did not believe that the scale house was in the blasting ar believe that the inclusion of the scale house personnel dur of the hearing was an after-thought to bolster MSHA's theor of "blasting area".

Although Mr. Lucas conceded that there were no designa shelters at the location of the shot, a drill rig, a shot t driller's maintenance truck were present and he considered to be suitable blast shelters (Tr. 67-69). However, in his the men are at a safe distance there is no need for them to the equipment. As for himself, he conceded that he was not any piece of equipment because he believed he was at a safe 300 feet from the actual blast operating his detonating dev the fact that he believed he was at a safe distance, Mr. Lu of the opinion that a blaster must be able to observe the b to detect any misfires and to insure that the proper blasti takes place. Mr. Doan testified that the scale house was i area and that a rock would not penetrate the roof. He also that the crusher is constructed of structural steel and was shelter".

Inspector Bondra conceded that a piece of equipment ca an adequate blasting shelter, and he confirmed that the dri was some thirty feet from where Mr. Lucas was standing at t the detonation would be a shelter. Even though he indicate

I have some difficulty in comprehending precisely what MSHA's posit
s with respect to the alleged failure by Austin Powder to provide the
ype of shelter contemplated by the second sentence of section 77.1303(h
suspect that the inspector decided to include this specification in hi
itation after determining during his investigation that Mr. Lucas was
tanding some thirty feet from the drill rig and was not under it when
ebris from the blast went over his head. Since the inspector apparentl
id not determine where the rest of the crew was positioned, I have no v
f knowing what he had in mind with respect to the rest of the crew.

As I interpret the cited standard, if suitable blasting shelters ar
rovided, there is no requirement that persons be cleared and removed fr
e blasting area. Conversely, if persons are not within the blasting
rea, there is no logical reason for requiring suitable blasting shelter
e language of the standard leaves much to the imagination, and I suspe
hat this is the reason for MSHA's anemic argument which appears at pg.
f its brief as follows:

> * * * the fact that there were some trucks inside the blasting zones at the time of the blast is not a substitute for specifically designating and providing suitable shelters for the protection of miners. Unless the miners are trained in using shelters and know where the designated shelters are, they do not serve their intended purpose.

On the facts of this case, it would appear that the fatality which
ccurred prompted the inspector to conclude that suitable shelters were
ot provided. However, a fatality, in and of itself, does not establish
violation of any mandatory safety standard. On the facts of this case
cannot conclude that MSHA has established by a preponderance of any
redible evidence, that Austin Powder failed to provide suitable shelter
the contrary, I conclude and find that the evidence establishes that
uitable shelters, within the language of the cited standard, were in
act provided. If MSHA chooses to penalize a mine operator or its indep
ontractor everytime a fatality occurs, without regard to whether or not
e facts presented justify such a course of action, then I suggest it
eriously consider completely outlawing blasting or the use of explosive
r in the alternative, promulgating standards which make sense. I concl
nd find that MSHA has failed to establish that suitable shelters were
ot provided, and that portion of the citation which alleges that were
ot IS VACATED.

was served on Austin Powder Company after the inspector determined
blaster Lucas was not under a suitable shelter because debris fr
blast in question flew over his head while he was standing some
feet from a drill rig which the inspector believed constituted a
shelter. Here, since the victim was struck and killed by flyroc
apparently sitting on a spoil pile observing the blast, the insp
concluded that a suitable shelter was not provided, and that the
the victim was not cleared and removed from the blasting area.

For the same reasons articulated in my findings and conclus
concerning Austin Powder's alleged failure to provide suitable b
shelters or to remove persons from the blasting, I conclude and
that MSHA has failed to establish violations of the part of resp
Doan Coal Company. I find that Doan Coal took all reasonable st
remove persons from the blasting area prior to the detonation.
call came over the mine radio communications system, the loader
Albert Bloom, signaled the victim to shut down the crusher, and
seen by Mr. Bloom the victim was walking on the road in the dire
of the scale house. I conclude that the victim must have known
impending blast since he shut down his equipment and apparently
to go on a frolic of his own to the coal spoil pile to view the
these circumstances, I conclude that Doan acted reasonably, and
any requirement that a mine operator take a physical inventory c
its personnel and lead them individually to a safe shelter, I ca
conclude that Doan Coal Company could have done anything else to
the tragic accident which occurred in this case. Under the circ
the specification in the citation charging Doan Coal Company wit
to remove all persons from the blasting area IS VACATED.

With regard to the charge that Doan Coal Company failed to
suitable blasting shelters, I conclude and find that the primary
for providing such shelters fell on Austin Powder. MSHA's atter
hold Doan Coal Company responsible after the fact on the theory
scale house was not a suitable shelter and did not have a sign p
the door identifying it as such is rejected. If MSHA believes t
operator should label every piece of equipment or building as a
blast shelter", similar to those buildings labeled "civil defens
to be used in the event of a nuclear holocust, then MSHA should
think about promulgating some standards and guidelines in this r
specification noted in the citation is also VACATED.

ORDER

In view of the foregoing findings and conclusions, MSHA's p

George A. Koutras
Administrative Law Judge

ion:

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ied Mail)

SERVICE AGREEMENT

AUSTIN POWDER COMPANY
Cleveland, Ohio

Dated JANUARY 19, 19 81

EREAS, the undersigned customer may hereafter, from time to time, request certain assistance of AUSTIN COMPANY in connection with the performance of certain blasting work; and

EREAS, AUSTIN POWDER COMPANY is not engaged in blasting work, its business in explosives being confined he manufacture and sale thereof, but to assist the said customer, the said AUSTIN POWDER COMPANY has agreed, at es, to permit said customer the temporary use, free of charge, of the services of said company's employees, together thout certain needed equipment.

, THEREFORE, the undersigned customer hereby expressly agrees that, while engaged in said work, said employees nent are and shall be, on each occasion, to all intents and purposes, the employees and equipment of the said nd subject to said customer's sole supervision and control in all respects, and that all work and services so performed the sole risk and responsibility of the said customer. The undersigned customer further expressly agrees to indem- old harmless the AUSTIN POWDER COMPANY, its employees and agents, from any and all liabilities, damages, laims of any character, whether caused by negligence or otherwise, as a result of injuries to any property, any the said customer from such services or work (excepting only liability for injury or death of AUSTIN POWDER employees). The undersigned customer hereby expressly recognizes and assumes sole and absolute responsibility ult of the services or work of such employees or the use of equipment gratuitously furnished by said AUSTIN OMPANY.

greement shall continue in force until either party notifies the other, in writing, of its desire to terminate the such termination shall not relieve either party of any liability arising thereunder prior to such termination.

AUSTIN POWDER COMPANY

DAAN COAL COMPANY
Customer

T. Lusk
Dist. No. 023

By [signature]

ORIGINAL - CLEVELAND COPY PINK - CUSTOMER'S COPY YELLOW - SALESMAN'S COPY

-1-78

ETARY OF LABOR,	:	Complaint of Discharge, Discrimination
ehalf of		or Interference
ONY HERIGES, TOM ANTONINI,	:	
NY GIBSON and LARRY HALEY,		Docket Nos. KENT 80-14-D
Complainant	:	KENT 80-15-D
		KENT 80-22-D
	:	KENT 80-23-D
v.		KENT 80-42-D
	:	KENT 80-52-D
ND CREEK COAL COMPANY,		
Respondent	:	

ORDER OF DISMISSAL

FOR GOOD CAUSE SHOWN, the Secretary's motion to withdraw his complaint each of the above cases is GRANTED.

WHEREFORE IT IS ORDERED that the above proceedings are DISMISSED.

William Fauver
WILLIAM FAUVER, JUDGE

tribution Certified Mail:

Rosenthal, Esq., Office of the Solicitor, US Department of Labor, 4015 son Boulevard, Arlington, VA 22203

shall S. Peace, Esq,, Assistant Corporate Counsel, Island Creek Coal pany, 2355 Harrodsburg Road, PO Box 11430, Lexington, KY 40575

rison Combs, Esq., UMWA, 900 15th St., NW, Washington, DC 20005

WESTMORELAND COAL COMPANY, Contestant	:	CONTEST OF ORDE
v.	:	Docket No. WEVA
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Order No. 88689
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY P Docket No. WEVA A.C. No. 46-015
v.	:	
WESTMORELAND COAL COMPANY, Respondent	:	
	:	Eccles No. 6 Mi

DECISION

Appearances: John A. MacLeod, Esq., Crowell & Moring, Washingto
for Westmoreland Coal Company;
Edward H. Fitch, Esq., Office of the Solicitor, U.
partment of Labor, Arlington, Virginia, for the Se
of Labor.

Before: Judge Melick.

These consolidated cases are before me pursuant to sections
105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.
seq., "the Act", to contest an order of withdrawal issued to the
Coal Company (Westmoreland) under § 104(d)(1) of the Act and for
civil penalty proposed by the Mine Safety and Health Administrati
the violation charged in that order. 1/ The order before me (No.

1/ Section 104(d)(1) of the Act provides as follows:

If, upon any inspection of a coal or other mine, an aut
representative of the Secretary finds that there has been a
of any mandatory health or safety standard, and if he also

The fall occurred in an area of "old works" last mined in the 1930's the old No. 2 Entry of the two southwest main section. A work crew supervision of section foreman Robert Hairston, was sent to the sec- riday, January 8, 1982, and again on Monday, January 11, 1982, to pre uild a stopping needed to maintain required ventilation. On the latt crew arrived on the section around 4:30 p.m. Hairston first perform red examination of the work places and then assigned duties to the ers. In the sequence of operations, the continuous mining machine wa mmed to the last open crosscut, left, connecting southwest main with entry of the old inactive two north haulway. Albert Honaker, the rator, proceeded to clean rock and coal from the mine floor across th ide entry. While working there, Honaker observed what he described a 2/ at the top of the No. 2 entry that protruded from the left rib som

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td.) danger, such violation is of such nature as could signifi- ly and substantially contribute to the cause and effect of a or other mine safety or health hazard and if he finds such ation to be caused by an unwarrantable failure of such operator omply with such mandatory health or safety standards, he shall ude such finding in any citation given to the operator under Act. If, during the same inspection or any subsequent inspec- of such mine within 90 days after the issuance of such cita- , an authorized representative of the Secretary finds another ation of any mandatory health or safety standard and finds violation to be also caused by an unwarrantable failure of operator to so comply, he shall forthwith issue an order re- ing the operator to cause all persons in the area affected by violation, except those persons referred to in subsection (c) e withdrawn from, and to be prohibited from entering, such until an authorized representative of the Secretary deter- s that such violation has been abated.

Virginia State Coal Mine Inspector Danny Graham, testifying on behal erator, explained that the terms "brow" and "overhanging rib" are ess nonymous. Both terms were used in this case to describe the same phe nd I conclude that the terminology is indeed synonymous.

Arthur Burdiss, a roof bolter helper on Hairston's crew that recalled being warned by Honaker of the "overhanging brow" in the entry. Burdiss estimated that the brow protruded some 10 to 12 i feet of the rib. He and his co-worker, George Ayers, also tried the brow with the slate bar but they too were unsuccessful. They unable to bolt into the overhanging brow because of the position bolter canopy. Four roof bolts were, however, installed to withi of the outby edge of the brow.

Jim Milam was working with the deceased just before the roof unloaded the supplies needed to build the stopping and Milam exam to determine where to locate the stopping. At this same time, Ho ston were continuing in their efforts to take down the brow. Acc Milam, it projected 12 to 14 inches into the entry and had a "hai or separation in it. He recalls commenting that it looked like a and asked if it had been checked. Milam and the deceased then al cessfully to pull the brow down. Because of their inability to b with the slate bar, Milam thought it was safe and both men began

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3/ There is some divergence of opinion regarding the size of th The operator's witnesses who actually saw it before it fell descr ously as protruding from 10 to 14 inches from the rib along 4 to entry. The MSHA inspectors, basing their estimates on the amount after the fall, thought the overhang would have been 22 feet long inches thick, and with a brow of up to 68 inches. West Virginia spector Graham, testifying for the operator, estimated, based on ris, that the brow had projected 30 to 31 inches into the entry. sider the testimonial discrepancies in the size of the brow to be for purposes of this decision.

4/ Mr. Hairston, the section foreman, declined to answer questi to the subject matter of this case citing as grounds therefor the afforded by the Fifth Amendment to the U.S. Constitution. Counse could give no assurance that Hairston would not be subject to cri ity based on the subject matter of this case and did not contest privilege. No inferences have been drawn from Mr. Hairston's ref tify in this regard based on his invocation of the Fifth Amendmen

e to it than he initially thought.

As a preliminary matter, Westmoreland claims that the regulatory stan
e cited, 30 CFR 75.202, is unenforceably vague as applied to the facts
s case. The standard provides as relevant herein that "overhanging or
es and ribs shall be taken down or supported." Westmoreland appears to
: because an MSHA inspector testified that he would not necessarily cit
ry overhanging rib (for example, a one inch overhang) that in his opini
ed no hazard, enforcement of the standard was therefore based upon the
tive discretion of the various inspectors. Westmoreland also cites in
ard an internal MSHA memorandum which provides in essence that overhang
; should be cited only when they present a hazard (Government Ex. No. 2
letermining the constitutional validity of a regulatory standard where
ged for vagueness, however, the language of the standard itself must fi
examined. In this regard I find that the language provides constitutio
asonable certainty" and is indeed facially unambiguous. Accordingly, M
orcement practices under the standard are irrelevant to the defense ass
nally v. General Construction Co., 269 U.S. 385, 391; Boyce Motor Lines
United States, 342 U.S. 337.

Westmoreland next argues that the brow which fell did not constitute
erhanging rib" within the meaning of the cited standard. As previously
ever, West Virginia State Coal Mine Inspector Danny Graham testified on
of Westmoreland that the terms "brow" and "overhanging rib" were esse
synonymous. The terms were used in this case by counsel and various
es to describe the same phenomenon and I have already concluded that t
ls are indeed synonymous. It is accordingly immaterial whether the cit
nomenon is referred to as a "brow" or "overhanging rib". I find that t
nomenon was, regardless of the terminology used, an "overhanging rib" w
meaning of the cited standard.

Westmoreland further contends that a violation of the cited standard
be supported where "every means of taking down or supporting an allege
hanging rib was either infeasible or presented a potential hazard equa
reater than the hazard presented by that overhanging rib." The conten
olve elements of two affirmative defences, i.e. impossibility of perfor
compliance) and the "greater hazard defense". In order to establish t
ner defense, the operator must prove that (1) compliance with the requi
s of the cited standard either would be functionally impossible or wou
lude performance of required work, and (2) alternative means of employ
ection are unavailable. Diamond Roofing Company, Inc., 80 OSAHRC 76-3
A OSHC 1080, 1980 CCH OSHD ¶ 24,274 (Feb. 29, 1980); Secretary v. Sewe
Co., 3 FMSHRC 1380 (1981), aff'd 686 F.2d 1066 (4th Cir. 1982). In o
blish the latter defense, the operator must prove that (1) the hazards

elements of either the impossibility of compliance or the "great defense.

It has not been shown for example that it was necessary in stance to have required the miners to have erected a stopping be hanging brow. Evidence has not been presented to demonstrate th could not have been erected in a safer location or that other al of meeting the ventilation requirements were unavailable. Even endo, that such alternatives were unavailable, Westmoreland has that it would have been more hazardous to have supported or take ing brow down.

MSHA apparently concedes that the overhanging roof in this reasonably have been blasted down or supported with roof bolts (opy on the roof-bolting machine would not allow the machine to b the subject brow) and that posts or crib blocks could not have b because of the angle of the brow (Government Ex. No. 4, page 4). tains, however, that the overhanging roof could have been cut do continuous mining machine. There is no dispute that no efforts this. Westmoreland concedes, moreover, that the continuous mine been brought in parallel to the old No. 2 entry if additional ro been first provided in the entry. It contends, however, that on nity of the brow, the ripper heads of the miner might have come with roof bolts located in close proximity to the brow, causing sibly tearing down part of the roof. Westmoreland's argument fa take into consideration that the continuous miner could have bee to trim the brow just ahead of the roof bolting operation. Thus ator could have progressed alternately with the roof bolter, cut brow without the ripper head of the miner ever being in close pr inserted roof bolts.

Westmoreland also contends that the brow was beyond the rea per head and therefore the miner could not have been used to bri Westmoreland ignores the evidence, however, that the miner could vated onto blocks that would have given the ripper head sufficie have reached the brow. While Westmoreland also claims that it w been safe to have placed roof bolts in the area between the last and the second last crosscut in the old No. 2 entry in order to tion the miner, no specific safety problems have been cited. To MSHA inspector Homer Gross opined that the continuous miner coul safely used to bring down the brow. Under all the circumstances that Westmoreland has not met its burden of proving either the " or "impossibility of compliance" defense. The cited violation is sustained.

ed in an injury of a reasonably serious nature. Secretary v. Cement Div
, National Gypsum Co., 3 FMSHRC 822 at 825. The test essentially involv
considerations, (1) the probability of resulting injury, and (2) the se
ess of the resulting injury. Even considering only the testimony from
ator's witnesses, it is clear that a substantial overhanging brow existe
he cited entry in which at least a hairline fracture or separation coul
rved. According to these witnesses, the brow protruded from 10 to 31 i
the rib for as long as 22 feet of the entry. Even had the fracture or
ion not been observed, Westmoreland's expert witness, Dr. Syd Peng, conc
fractures may very well exist that are not visible. In addition, the
ing brow in this case was sufficiently obvious to have attracted the att
of at least six experienced miners who were sufficiently concerned to
nade efforts to bring it down with a slate bar. It may reasonably be i
therefore that all of these miners, at some point in time, perceived the
as a serious hazard. Under all the circumstances, I conclude that the
on presented a high probability of serious or fatal injuries. There in
ted a reasonable likelihood that the hazard of a roof fall would occur,
lting in injuries of a serious nature. Accordingly, I find the violati
ave been "significant and substantial". For the same reasons, I find tha
violation reflected a high level of gravity.

I further find that the violation was the result of the unwarrantable f
f the operator to comply with the law. A violation is the result of "u
ble failure" if the violative condition was one which the operator knew
d have known existed or which the operator failed to correct through i
ce or lack of reasonable care. Zeigler Coal Co., 7 IBMA 280. In this
the negligent acts of section foreman Robert Hairston are attributable
perator. Secretary v. Ace Drilling Co, Inc., 2 FMSHRC 790 (1980). It
puted in this case that Hairston had been warned about the overhanging
ssue, had seen the condition, and had apparently deemed it sufficiently
s to have made efforts on his own to bring it down with a slate bar. T
existence of this brow as described by the operator's own witnesses cle
ituted a violation of the cited standard. It may reasonably be inferre
fore, that Hairston had knowledge of the violative condition but failed
rrect that condition through indifference or lack of reasonable care.
er Coal Co., supra. The violation was accordingly the result of the un
ble failure of the operator to comply with the law and, indeed, of gros
gence. Accordingly, I affirm the order at bar.

In determining the amount of civil penalty that is appropriate in this
I also consider that the operator is large in size, that it has a fair
antial history of violations, and that the penalty here imposed would n
t its ability to stay in business. Within this framework of evidence,
that a penalty of $8000 is appropriate.

30 days of the date of this decision.

Gary Melick
Assistant Chief Administrative

Distribution: By certified mail.

John A. MacLeod, Esq. and Orin H. Kutinplan, Crowell and Moring, 110
Avenue, N.W., Washington, DC 20036

Edward H. Fitch, Esq., Office of the Solicitor, U.S. Department of I
Wilson Boulevard, Arlington, VA 22203

S J. FRAZIER, Complainant,	COMPLAINT OF DISCRIMINATION
v.	DOCKET NO. WEST 81-329-D
ON-KNUDSEN, INC., Respondent.	

ances:

y Overfelt, Esq.
Petroleum Building
lings, Montana
for Complainant

l K. Madsen, Esq.
7 Washington Avenue
en, Colorado
for Respondent

: Judge John J. Morris

DECISION

omplainant Charles J. Frazier, (Frazier), brings this action on his half alleging he was discriminated against by his employer, on-Knudsen Company, Inc., (MK), in violation of the Federal Mine and Health Act of 1977, 30 U.S.C. § 801 et seq.

ne applicable statutory provision, Section 105(c)(1) of the Act, now ed at 30 U.S.C. 815(c)(1), in its pertinent part provides as :

> No person shall discharge or in any other manner discriminate against ... or otherwise interfere with the exercise of the ststutory rights of any miner ... because such miner ... hss filed or made a complaint under or relsting to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners ... of an alleged danger or safety or health violation ... or because such miner ... has instituted or caused to be instituted any proceeding

The threshold issues are whether complainant, as a management supervisor, is within the coverage of the Act and, further, whether the complaint was timely filed.

The issue on the merits is whether respondent discriminated against complainant, a safety supervisor, in violation of the Act.

COVERACE

Respondent contends that complainant does not come within the coverage of the Act since he is a member of management.

The uncontroverted facts establish that complainant was employed as safety specialist in respondent's surface coal mine operation (Tr. 99, 199). The answer to the coverage issue is found in the Act itself where "miner" is unsmbiguously defined as any individual working in a coal or other mine, Section 3(g). Management personnel working in a coal mine a therefore "miners" within section 105(c)(1) and they are accordingly entitled to the protections afforded therein. Accord: Miller v. Federal Mine Safety and Health Review Commission, 687 F. 2d 194, (7th Cir August 1982). Eagle v. Southern Ohio Coal Company, 2 FMSHRC 3728, December 198 (Merlick, J.). Herman v. IMCO Services, 4 FMSHRC 1540, August 1982 (Morris, J.).

The motion to dismiss for lack of coverage is denied.

TIMELY FILINC OF COMPLAINANT

MK asserts the complaint of discriminatory discharge was not timely filed. The discharge occurred on April 28, 1981 and the first notice MK received was when Frazier filed his amended petition in this case on Aug 25, 1981, approximately four months later.

On May 12, 1981, in the process of investigating his discriminatio complaint, MSHA took a 12 page handwritten statement from Frazier (Commission File).

On June 15, 1981 MSHA advised Frazier that on the basis of their i vestigation they concluded that no violation of Section 105(c) had occurred. On July 14, 1981 Frazier appealed to the Commission. On Aug 26, 1981 an "amended complaint" was filed before the Commission allegin Frazier was unlawfully discharged on April 28, 1981 for engaging in a protected activity.

DISCUSSION

It has been held that none of the filing deadlines in the discrimination section of the Act are jurisdictional in nature. Christ v. South Hopkins Coal Company, 1 FMSHRC 126, 134-136 (1979), Bennett v. Kaiser Aluminum & Chemical Corporation, 3 FMSHRC 1539, (1981).

All of the above facts indicate that Frazier was pursuing his disciminat ion complaint in a timely manner. To support MK's argument w be to exalt form above substance.

The motion to dismiss for untimely filing of the complaint is deni

COMPLAINANT'S EVIDENCE

Complainant's evidence consists of the testimony of Charles J. Frazier, Jewell Davisson, and numerous exhibits.

Charles J. Frazier was employed with Morrison-Knudsen as a safety supervisor 2 on April 24, 1979 (Tr. 14, 19, 56). He was terminated Apr 28, 1981 (Tr. 14). Frazier's initial assignment was at the MK mine in Kemmerer, Wyoming. At that location Frazier reported to Gary Kilstrom, senior safety aupervisor (Tr. 58). Frazier's relationship with Kilstro developed into a personality conflict (Tr. 58). Frazier was not as sev as Kilatrom (Tr. 62-63).

Frazier was subsequently transferred to the MK Absoloka Mine in Billings, Montana where he worked under Jed Taylor, mine manager (Tr. 1 He also reported to Richard Daly in the home office. Daly was in charg safety and environmental services (Tr. 19).

In February 1980, Frazier was restricted to his office (Tr. 141).

In September 1980 MK had a ground control problem in pit No 27-28). MSHA inspector Clayton issued a citation and told Taylo manager) what he expected to be done (Tr. 28). Taylor made the "that's the way the Good Lord meant it to be and there wasn't no could do to change it." Frazier felt this was a poor safety att behavior (Tr. 28).

In September 1980 Frazier reported an unsafe condition to W (mine superintendent) in pit No. 4 (Tr. 33). Wunderlick told Fr wasn't to be in the pit (Tr. 33).

In December 1980 Frazier gave a company safety citation to in a local bar (Tr. 89, 158). The union complained and Taylor w stating that company business shouldn't be conducted in a bar (T Frazier said he'd apologize to Lix for giving it to him in a bar would'nt apologize for the citation. He told Taylor he could "e 101).

On one occasion Taylor told Frazier that his [miner] traini inadequate (Tr. 35). Frazier felt the Company's facilities and aids were inadequate. Frazier made requests for teaching aids f arrived until he ceased to conduct miner training which was abou months before he was terminated (Tr. 37). Frazier received no r from his supervisors and no aids except a projector (Tr. 37). T text books he had were those he had brought from MSHA (Tr. 38).

Frazier and Doug Harper, an MSHA inspector, have a personal conflict. On one occasion Frazier flunked Harper in a mine resc Harper felt Frazier didn't have sufficient education in safety a (Tr. 40).

In December, 1980, and January, 1981, Frazier was aware tha Local 400 of the Operating Engineers were negotiating a labor co 40-41). Frazier hadn't made his union preference known to other except about a year before his discharge he told Chaps Lix that

ict between the unions) (Tr. 81, 82).

ier went to the home office in Boise in midwinter, 1981 (Tr. 41, lor said Frazier was being sent to the home office because of a he (Taylor) had received from the Operating Engineers (Tr. 76).

pril 7, 1981 Frazier talked to Dean Gilson in the home office. ld Frazier he'd have to get along with Taylor or his career would pardy (Tr. 44, 45). Frazier replied he wouldn't take any guff off and "to hell with his career" (Tr. 44-45). Frazier isn't overly aylor (Tr. 149).

pril 8, 1981 Frazier told fellow safety supervisor Barnett that he course but to go to MSHA (Tr. 46).

pril 10, 1981 [1]/ Frazier was transferred to the swing shift Frazier was told that Barnett was going to do the training. Frazier wasn't qualified and Frazier agrees he wasn't qualified 47).

pril 11 Frazier went to the home of MSHA inspector Dick Clayton. ime he listed 12 violations (Tr. 45, 46). [A detailed analysis of aints is set forth, infra, pages 13-14.] An MSHA inspection took April 24, 1981 (Tr. 47).

t this time Frazier posted the NLRB election decision on the union board (Tr. 96, R3).

pril 28, 1981 Taylor called Frazier to the office and accused him ring one union over the other (Tr. 105). Frazier said he wanted s accuser. At this juncture Taylor terminated Frazier (Tr. 105). hen told Taylor he hadn't seen the last of him. Further, he said rned MK into MSHA. In addition, Frazier said he had filed a ation complaint (Tr. 107).

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er's testimony is that he was put on the straight swing shift on but the manager's memorandum of transfer is dated April 10, 1981 azier was already on the swing shift and management's directive ed that the shift would be "non rotating". I accordingly consider pril 10th, 1981 as the first date Frazier knew he would continue ing shift.

Frazier's first assignment was at the Kemmerer, Wyoming mir reported to Gary Kilstrom (Tr. 407, 417). Problems with Frazier Kemmerer Mine included tardiness, an odor of alcohol, and failur awake (Tr. 418).

MSHA inspector Doug Harper, a safety trainer, first inspect 1979. He evaluated the training and except for first aid he cor the miner training was insufficient (Tr. 175-180). Charles Fraz conducting the training (Tr. 76). Harper prepared a written rep was dated December 18, 1979 (Tr. 178, 179, R7). The final repor conclusion was issued on January 9, 1981 by Walter R. Schell, MS administrator located in Denver, Colorado (Tr. 178, R7). The MS states, in part, that use should be made of the large body of in visuals, films and tapes available (R7).

Harper had never received any training from Frazier althoug spent four to five hoors monitoring Frazier's class as an observ 186, 195).

On May 31, 1979 Bruce Zimmerman, MK's training manager, in interoffice memorandum to his supervisors reviewed the on going and program development to meet the requirements of MSHA at thre (Tr. 357, R13). The memorandum states in part: "In addition Cha [Frazier] has a vast resource library of overheads, handouts and material" (R13, Tr. 367, 368).

Dean Gilson, MK's manager for safety and training, asked th report be withheld until MK could improve its training (Tr. 426) Zimmerman was sent to work with Frazier in an effort to change t comments on his performance (Tr. 427). At a meeting on January Zimmerman related the feelings of George Herman and Doug Harper personnel) to Frazier (Tr. 364). Zimmerman further suggested th should be less confrontive and less antagonistic. Frazier agree 365). About the first of December, 1980, the local union, Opera Engineers Local 400, was negotiating with the company over the t labor contract (Tr. 322). At this time workers complained to Da Camden, a union stewart, about Frazier's efforts to influence un representation at the mine. Frazier was advocating that the MK weren't getting representation from Local 400. Further, Frazier advocating that Local 400 should be kicked out and the workers s in the United Mine Workers (UMW) (Tr. 261, 332). There were ap 15 such complaints over an eight to ten month period (Tr. 264-26 and Mike Pascal reported these conversations to David Whempner, of Local 400 (Tr. 226, 232-233, 263). At that time Whempner com mine manager Jed Taylor, who suggested that the matter be tabled

ng the company policy that MK was to remain neutral between the two
Frazier was present at the January 6, 1981 meeting. Whempner, a
ficial and Taylor, mine manager, identified Frazier at the meeting
-208, 276-277).

eek or two later Camden told Whempner that Frazier and Lix had been
gument in a bar about the union. At that time Frazier wrote
x a company safety violation in a local bar (Tr. 235). Lix brought
tion to Camden. Whempner in turn went to the mine and "raised
th the Board of Adjustments and threatened Jed Taylor with an NLRB
abor charge. Specifically, the stewards had been telling Whempner
zier was telling everybody that Local 400 had given away over half
labor contract. In addition to "raising hell" with Jed Taylor
contacted his boss, Vince Bosch, in Helena, Montana and "raised
th him (Tr. 238). Bosch indicated that unfair labor charges would
by Local 400 against MK (Tr. 240). [No such charges were in fact
ed (Tr. 241).]

ce Bosch, Whempner's boss, contacted Burge (Industrial Relations
after Whempner complained. The problems ceased. Frazier was
ily transferred to the home office in Boise, Idaho on January 28,
re he remained until March 10, 1981 (Tr. 241, R1). Problems for
resumed when Frazier returned to the mine (Tr. 241-242).

r he returned from Boise Taylor assigned Frazier to the second
. 468). The shift assignment was no different from any other
nt (Tr. 468). The notice to Barnett and Frazier dated April 10,
tes "It is not beneficial to have rotating shift in the Safety
nt at this time because of our busy schedule and various activities
training sessions and meetings. Therefore, we will continue to
n "atraight" ahift until further notice. Should you have any
on this, please do not heatitate to call me" (R2).

the meantime the United Mine Workers had petitioned the NLRB
ng an election between the UMW and Local 400 (R3). The order
g the election was entered on April 13, 1981 and the notice was
amped as received by MK on April 16, 1981 (R3). Shortly thereafter
eward Camden called Whempner and told him that Frazier was passing
e notice of the election at the mine site and urging the miners to
the "right outfit" (Tr. 243, 401-403). Whempner "raised hell"
-245). Whempner'a complaint were that Frazier was passing the
notice around in the lunchroom and change room (Tr. 248). The

the NLRB order and he said they should vote for the right outfit so can get some representation out there" (Tr. 403). At this time the wh swing shift was in the lunchroom (Tr. 403).

Whempner again tried to get Frazier removed and he called Burge, (Industrial Relations), who told him to review the problem with mine manager Jed Taylor (Tr. 209-210, 246).

Robert Wunderlick, the mine superintendent, told Taylor that Fra was in the lunchroom with the [NLRB] petition. Further, he related t Taylor that Frazier was claiming the contract was no good, that there going to be a new election, and that everything that had been done wa longer good (Tr. 469-470). Taylor called his superiors in Boise who him to immediately fire Frazier. Taylor said he wouldn't fire Frazie until he verified the report of Frazier's activities (Tr. 470-471). asked Wunderlick to double check the facts. He did. Camden told Wunderlick that Frazier had presented the paper to the workers (Tr. 2 Taylor had called his supervisors at the home office because home off concurrence is necessary to discharge a safety supervisor (Tr. 410). Burge, (Industrial Relations) and Dean Gilson, manager of safety and training, concurred with Taylor that his decision to terminate was appropriate (Tr. 210-216, 435-436).

Frazier was called to the office on the same day and terminated union involvement and for not following instructions (Tr. 470-471). been told three or four times to remain neutrsl (Tr. 474, 486-487). Frazier asked Taylor who was accusing him (Tr. 472).

When he was terminated Frazier said MK hadn't heard the last of (Tr. 477). Taylor didn't know of any MSHA charges brought by Frazier 478).

The safety record at the Absolka mine is excellent. It has two without a lost time acident for 500,000 man hours (Tr. 438-440, R19). mine incident rate is 0.0 compared with the average for the coal indu of 3.5 (Tr. 440, R20).

DISCUSSION

The Commission established the general principles for analyzing crimination cases under the Mine Act in Secretary ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC (October 1980), rev'd on other groun

thia point is appropriate to consider the status of Frazier's
es. The vast majority of discrimination claims arising under the
generated by minera engaged in duties other than those of a safety
r. But I find nothing in the text of the Act nor in the
ive hiatory that indicatea Congreaa intended to exclude a safety
r from the protection of the discrimination portion of the Act. An
'a aafety inapector bears an important function in helping fulfill
oses of the Act since his duties will ordinarily seek to promote
nd health. Under Pasula and Robinette and their progeny I conclude
d faith complaints of unaafe and unhealthy conditiona by a safety
r in the ordinary course of his duties are protected under the

ing reaolved Frazier's atatus we will go to the Commisaion's
ruling in Robinette: to rebut a prima facie case a operator must
her that no protected activity occurred (in view of the ruling aa
er's atatus MK cannot establish that defense) or that the adverse
as in no part motivated by protected activity, 3 FMSHRC 817-818 and
If an operator cannot rebut the prima facie case in the foregoing
t may nevertheless defend by proving that it was also motivated by
r's unprotected activities and that it would have taken the adverse
n any event for the unprotected activities alone, Pasula, 2 FMSHRC
0.

operator bears an intermediate burden of production and perauaaion
ard to theae elementa of defense. Robinette, 3 FMSHRC at 818 N.
s further line of defense applies only in "mixed motive" caaea,
ses where the adverae action is motivated by both protected and
ted activity. The Commission made clear in Robinette that the
burden of persuasion does not shift from the complainant in either
case. 3 FMSHRC at 818 N. 20. The foregoing Pasula-Robinette teat
in part on the Supreme Court'a articulation of similar principlea
ealthy City School Dist. Bd. of Educ. v. Doyle, U.S. 274, 285-87

Sec. ex rel. Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508 (November
et. for review filed, No. 81-2300 (D.C. Cir. December 11, 1981),
ission affirmed the Pasula-Robinette test, and explained the
g proper criteria for analyzing an operator'a business justifica-
adverae action:

charter nor the specialized expertise to sit as a supe
grievance or arbitration board meting out industrial
equity. Cf. Youngstown Mines Corp., 1 FMSHRC 990, 994
Once it appears that a proffered business justificati
not plainly incredible or implausible, a finding of p
is inappropriate. We and our judges should not subst
for the operator's business judgment our views on "goo
business practice or on whether a particular adverse
was "just" or "wise." Cf. NLRB v. Eastern Smelting &
Corp., 598 F. 2d 666, 671 (1st Cir. 1979). The prope
pursuant to Pasula, is on whether a credible justific
figured into motivation and, if it did, whether it wo
led to the adverse action apart from the miner's prot
activities. If a proffered justification survives pr
analysis ..., then a limited examination of its subst
becomes appropriate. The question, however, is not w
such a justification comports with a judge's or our s
fairness or enlightened business practice. Rather, t
narrow statutory question is whether the reason was e
to have legitimately moved that operator to have disc
the miner. Cf. R-W Service System Inc., 243 NLRB 120
04 (1979) (articulating an analogous standard).

3 FMSHRC at 2516-17. Thus, the Commission first approved
analysis of an operator's proffered business justification to d
whether it amounts to a pretext. Second, the Commission held t
is determined that a business justification is not pretextual,
judge should determine whether "the reason was enough to have l
moved the operator" to take adverse action.

By a "limited" or "restrained" examination of the operator
justification the Commission does not mean that an operator's b
justification defense should be examined superficially or autom
approved once offered. Rather, the Commission intends that its
carefuly analyzing such defenses, should not substitute his bus
judgment or sense of "industrial justice" for that of the opera
Commission recently stated "our function is not to pass on the
fairness of such asserted business justifications but rather on
determine whether they are credible and, if so, whether they wo
motivated the particular operator as claimed." Bradley v. Belv
4 FMSHRC 982, 993 (June 1982).

:as receiving complaints from the union official. After this Frazier wa
ransferred to the home office. Taylor, the mine superintendent told
'razier he was being transferred because of complaints by Local 400. Pr
'arning of unsatisfactory conduct is one of the criteria mentioned in
radley v. Belva Coal Company. I accordingly conclude MK's business
ustification is clearly credible. Having made that determination the n
ssue is whether MK was motivated as claimed. Yes. The mine manager he
bout Frazier's actions involving the NLRB petition. He had the facts
erified by Wunderlick and Frazier was terminated that very afternoon.
he midst of two unions struggling to represent its workers company
eutrality would be normal practice. In short, Frazier was fired for
iolating MK policy.

Frazier's post trial brief asserts that MK discriminated against hi
hen he was transferred to the swing shift and thereafter terminated.

A vital element of a prima facie case is a showing that adverse act
as motivated in any part by the protected activity. If there is no dir
vidence then the Commission suggests four criteria to be utilized in
nalyzing the operator's motivation with regard to adverse personnel
ction. This criteria includes knowledge of the protected action,
ostility toward the protected activity, coincidence in time between the
rotected activity and the adverse action and disparate treatment of the
omplainant, Johnny N. Chacon v. Phelps Dodge Corporation.

Guided by the above case law we will review Frazier's initial
ontention that he was transferred because he was overzealous in the en-
orcement of safety regulations. I disagree with Frazier's position. I
ot find it credible, and no evidence supports the view, that MK waited
ntil April 1981 to take adverse action against Frazier for events in Ma
980 (dust sampling program), in September 1980 (problems in pit #4), an
ecember 1980 (citation issued in a bar). 2/

In short, there is no coincidental timing as required by Johnny N.
acon v. Phelps Dodge.

Frazier complaints about the miner training aids, even if true, cou
rdly have affected MK's action since Frazier had been transferred from
ie training duties four months before he was terminated (Tr. 37).

neither party inquired into the reason for Frazier's telephone
about April 7, 1981 (Tr. 405-444). There is accordingly no evi
establishing that Frazier was engaged in any protected activity
that date.

Frazier's post trial brief asserts that there is evidence
Wunderlick [superintendent] ordered Frazier to stay out of safe
in the pit. This event apparently occurred in September, 1980.
occurred when Frazier reported an unsafe condition to Wunderlic
took Rob Williamson, the then senior safety officer, down to th
Wunderlick told Frazier he wasn't to be in the pit (Tr. 33).

This event, like the other 1980 incidents, lacks coincident
as required by Johnny N. Chacon.

Frazier's post trial brief further asserts that whenever a
violation was issued Frazier was blamed for reporting the viola
MSHA. I have carefully reviewed the record and absolutely no e
supports this proposition.

Frazier's post trial brief states there are indications th
Taylor and Wunderlick were upset because Frazier went over thei
contacted the home office about safety. Even if Taylor and Wun
"upset" with Frazier the record fails to establish the prerequi
coincidental timing.

The evidence here shows that Frazier was restricted to his
March 1980. On this point I credit Wunderlick's uncontroverted
that this restriction came about because Frazier wasn't abiding
to work out matters of safety with supervisors (Tr. 284, 296).
this event occurred in early 1980 and like the other incidents
persuaded that it generated adverse personnel action approximat
later.

Frazier's brief argues that, although there is some disput
exact working, it is clear that Dean Gilson reprimanded Frazier
"demanding attitude."

I find all of Frazier's contentions to be without merit. I do not ind that Taylor's permanent assignment of Frazier to the swing shift was o cloak a discriminatory move. Taylor's stated reason was that "it is n eneficial to have rotating shift in the Safety Department at this time ecause of our busy schedule and various activities such as training essions and meetings. Therefore, we will continue to operate on straight" shift until further notice." (R2). Independent facts support ne operator'a decision since Barnett, MK's only other safety officer at his mine, had taken over the training duties. I further credit Taylor's estimony that the shift assignment was no different involving Frazier th nyone else (Tr. 468). In short, the proferred business justification he s not plainly incredible or implausible.

It should be noted that Frazier engaged in two additional activities hich have been held to be protected under the Act. One protected activi nvolved Frazier's complaint of discrimination filed with MSHA when he wa ansferred to the swing shift. But the record here fails to establish at MK knew of Frazier's complaint. If MK didn't know that Frazier had led a discrimination complaint then that protected activity could not ve influenced MK's decision to fire Frazier.

Frazier also contends he was fired because he filed safety complaint th MSHA.

An in depth review of such complaints is in order. The scenario: th y after Taylor made Frazier's swing shift assignment permanent Frazier nt to the home of Howard R. Clayton, an MSHA inapector (Tr. 331-332). azier's complaints to MSHA's Clayton involved ground control, the minin an, dust sampling, excessive noise, dust accumulations, oxygen ficiencies, dragline moving over miners, inadequate fire training, perintendent's mining papera, ambulance training, explosives, OSM olations for not dewatering pits, improper ground on a 280 B shovel, al ists, transformer, watering work roads, keys to electrical unit, and corda required to be kept (Tr. 331-345).

MSHA investigated and for various reasons concludcd that Frazier's legations did not support the issuance of any citations except for the leged violation of the fire training regulations, 30 C.F.R.

On this record MK could only have learned of the MSHA safety complaints from MSHA inspector Clayton, from Barnett, or from Frazier self.

Concerning Inspector Clayton: I credit the professionalism of Clayton who observed at the hearing that it was against the law to not an operator of the identity of an informant (Tr. 346-347). Further, Clayton couldn't recall telling anyone with MK that Frazier was the in formant (Tr. 345-346).

Concerning Barnett: Frazier says he told Barnett about going to M However, no evidence establishes that Barnett communicated this inform to his supervisors. I find Barnett's testimony illustrates the situat namely "I heard from the day I walked on that mine site to [the] day h [Frazier] left that at some time or another 'I [Frazier] should file charges with MSHA' or 'I'm [Frazier] going to call the feds', or 'I'm [Frazier] going to call my friends back in Pittsburg' or whatever, and charges. That was just a rhetoric of something that went on all the t (Tr. 354).

Concerning Frazier himself: Frazier does not claim, before he was terminated, to have notified MK supervisors that he was the MSHA infor In fact, Frazier indicates it was he who told Taylor after his termina that he was the informant (Tr. 107).

3/ Citation 827683 alleges as follows:

There is no record or indication that the mine operator is complying 77.1100 of the CFR, in that employees are not being instructed or trai annually in the use of firegighting facilities and equipment.

4/ Citation 827682 alleges as follows:

The opening under the Bucyrus Erie 280B shovel located in 004-0 pit d have a guard or cover over it. This allowed access in through the fr the machine to the high voltage collector rings (4160 volts). This i non-compliance of Article 710-44 of the 1975 National Electrical Code

ital issue is whether MK could reasonably believe that such information as truthful. On the basis of the facts previously stated I conclude MK ould have such a reasonable brief. I further find MK did not seize on hese events as a pretext to cloak a discriminatory move.

Further bearing on a resolution of the credibility in this case are he facts that Frazier agrees he expressed a union preference although h laims this occurred before contrary instructions were issued by MK (Tr. 3). In addition, direct testimony confirms the event that triggered razier's discharge: Vandersloot testified Frazier came into the lunchr ith the NLRB order and told the men to vote for the "right outfit" so " an get some representation out there" (Tr. 401-403). Frazier's testimo tself reflects that he had the NLRB decision (Tr. 96).

The Commission does not attempt to count witnesses but I find that K's evidence, a combination of witnesses from management, union, and ellow workers, has carried the operator's burden of proof as required i avid Pasula. In short, I find that MK would have fired Frazier for his ctivities preferring one union over the other regardless of any protect ctivity.

Frazier's final contention that no one from MK interviewed Chaps Li icks merit. There is no obligation on MK to seek out Chaps Lix especia ere some 15 complaints arose about Frazier's union activities (Tr. 265 addition, I find that union official Whempner who was the person mplaining of Frazier's activities did, in fact, talk to Lix. This curred at the same time Whempner first went to Jed Taylor in December, 80 (Tr. 233-234).

Since no discrimination occurred in violation of the Act it is un- cessary to consider Frazier's claim for damages.

Based on the foregoing findings of fact and conclusions of law I en e following:

ORDER

The complaint of discrimination is dismissed.

John J. Morris
Administrative Law Judge

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	)	DOCKET NO. WEST 82-87-RM
Contestant,	)	Citation 567341; 12/3/81
	)	DOCKET NO. WEST 80-453-RM
v.	)	Citation No. 566900
	)	(Consolidated)
RY OF LABOR, MINE SAFETY AND	)	
ADMINISTRATION (MSHA),	)	MINE: Climax
	)	
Respondent.	)	
	)	

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John A. Carlson, Judge

DECISION AND ORDER

ese two cases were consolidated for decision upon joint motion of ties. Docket WEST 80-453-RM was fully tried upon the merits; WEST M wss not tried, but as shown in the pleadings, involves an al question of law. Upon the parties' representation thst the ing facts were the same as those adduced at hearing in WEST 80-453, ion for consolidation for decision was granted. Both cases arose contests of a 104(a) citation. The citations in both cases alleged on of the mandatory standard published at 30 C.F.R. § 57.20-11. It s:

> Aress where health or safety hazards exist thst are not immediately obvious to employees shall be barricaded, or wsrning signs shall be posted at all approaches. Wsrning signs shall be readily visible, legible, display the nature of the hazard, and any protective action required.

I

The parties have no significant disagreement as to most of the
Climax Molybdenum Company (Climax) operates a large molybdenum mine
Leadville, Colorado. Radon gas is naturally present in measurable
quantities in certain underground areas of the mine. The gas which
emanates from uranium in the ore body or surrounding rock is not its
dangerous to miners, but as it decays it liberates radioactive parti
known as radon daughters. Health authorities recognize that certain
these particles cause respiratory cancer when inhaled over prolonged
periods of time. Consequently, the Secretary has promulgated a numb
specific mandatory health standards regulating exposure levels to ra
progeny. These are found at 30 C.F.R. § 57.5-37 through 57.5-47. T
standards use the "working level" as the measurement of radon daught
exposure. 1/ Four working level months exposure are permitted in any
calendar year under 30 C.F.R. § 50.5-38. Other standards prescribe
sampling techniques, the frequency of testing, and record keeping re
In a non-uranium mine such as Climax, 30 C.F.R. § 57.5-40 requires t
operator to record the exposure received by all miners working in ar
where concentrations exceed 0.3 WL.

None of the radiation standards mention smoking except for 30 C
§ 57.5-41 which provides:

> Smoking shall be prohibited in all areas of a mine where
> exposure records are required to be kept in compliance wit
> standard 57.5-40.

1/ The term is defined at 30 C.F.R. § 57.2 as:

> ... any combination of the short-lived radon daughters in
> one liter of air that will result in ultimate admission of
> 1.3×10^5 MeV (million electron volts) of potential alpha
> energy, and exposure to those radon daughters over a period
> of time is expressed in terms of "working level months" (WLM
> Inhalation of air containing a radon daughter concentration
> 1 WL for 173 hours results in an exposure of 1 WLM.

computerized system for regulating miner's exposure. He alao concedes the north hanging wall area, on the date of inspection, displayed a "n smoking" sign in conformity with section 57.5-41.

The Secretary contends, however, that scientific data disclose th persons who smoke cigarettes and who are also exposed to radon daughte experience a far higher incidence of respiratory cancer than do miners do not smoke, or smokers who are non-miners. Moreover, according to t Secretary, the incidence of cancer in smoking miners who are exposed t radon daughters significantly exceeds the rate predictable from adding incidence observable for non-smoking miners and the incidence for non- miner smokers. In other words, the Secretary maintains cigarette smol and radon daughter exposure interact synergistically to create significantly greater probabilities of cancer than one would expect fr looking at either type of exposure alone, or from the sum of the two.

The Secretary provided evidentiary support for his position throu the testimony of Victor E. Archer, M.D., Clinical Professor at the University of Utah School of Medicine. Dr. Archer, a Fellow of the American College of Preventive Medicine, has specialized in the study the biological effects of radon daughter exposure on humans (Tr. 32). testimony traced the history of epidemiological studies in this countr elsewhere which indicate that radon daughter exposure has a linear relationship to the incidence of cancer - the greater the exposure, th higher the respiratory cancer rate. Studies of uranium miners conduct under his direction, he testified, further showed respiratory cancer r were higher among cigarette smokers than non-smokers where radon daugh exposures were the same. He presented a graph based upon data obtaine from his uranium miner studies and those of the American Cancer Societ which investigated the relationship between lung cancer and smoking.

2/ A stipulation made during the hearing shows that radon daughter concentrations monitored in the Climax Mine during the year preceding issuance of the citation ranged from .00 to 5.77 working levels (Tr. 74-75). Respondent's exhibit 3 shows readings at various locations, including the "north hanging wall," which was the area singled out in citation. The highest reading disclosed in the exhibit for that area 0.33 working levels, recorded on August 11, 1980. There is no dispute to the exhibits's accuracy.

asserted that the data establish that the "induction latent period" (th
time between initial exposure and ultimate onset of cancer) was
"considerably" shorter for smoking miners than for non-smoking miners
45). From the studies and his experience and training he was of the
opinion that for miners exposed to radon daughter concentrations:

> ... the first 25 years the lung cancer rate substantially increased and that the induction latent period would be shorter among smokers. (Tr. 47.)

He further believed that this would be true for exposure levels below
working level months allowed as a maximum annual exposure under the
Secretary's radiation rules. In fact, according to Dr. Archer, some c
risk exists at any level of radon daughter exposure, and that risk wou
all instances be enhanced by smoking (Tr. 57-58).

In Dr. Archer's opinion, miners should be warned of the effects o
smoking whenever radon daughter concentrations substantially exceed no
ambient air or "background" levels. When questioned regarding the pre
concentration which should trigger a warning, he responded with this
specific recommendation:

> Any level one sets is somewhat arbitrary, but I would suggest that one-tenth working level would be a reasonable place (Tr. 60).

This is the proposition upon which the Secretary founds his citat
He concedes that the north hanging wall area displayed a "no smoking"
in compliance with standard 57.5-40. Because miners who smoke cigaret
at any time or place and also inhale radon decay particles in the mine
environment are especially vulnerable to respiratory cancer, the Secre
reasons that that hazard must be spelled out to miners. The standard
CFR § 57.20-11, he maintains, imposes a clear duty upon Climax to post
a sign wherever radon readings exceed 0.1 working levels. This is so
because smoking, when combined with radiation exposure, is a health ha
"not immediately obvious to employees," in the words of the standard,
thus one which must be emphasized and explained by a warning sign.3/

3/ The Secretary does not contend that Climax's duty extends beyond t
giving of a warning; he has not suggested, for example, that compliance
with any standard demands any sanctions against miners who smoke outsi
the mine.

ic community, he testified, as to the proof of a synergistic
ship (Tr. 123). [4]/

nax also stresses an admission from Dr. Archer that the various
which led him to his conclusions were conducted at a time before
stringent limitations on radon daughter exposure were in effect
. Exposures of the studied miners could thus have been many times
nan those now permitted at Climax.

II

nax's basic defenses may be summarized as follows:

The evidence does not prove that risk of respiratory cancer
d with radon daughter exposure is increased synergistically by
smoking.

The plain language of section 57.20-11, together with its
show that the standard was not intended to address hazardous
outside the mine - including smoking at home.

A comprehensive body of regulations covers the admitted hazards
from radon daughters. At section 57.5-41 these regulations cover
n radiation areas. Operators are entitled to rely on these
ns as encompassing the requirements with respect to smoking as it
o radon daughters. Consequently, the Secretary cannot properly
a "general" regulation such as 57.20-11 to impose a requirement
warning against smoking at home.

III

esolving this dispute I do not decide whether the Secretary's
t of the combined smoking and radiation hazard is valid. Such a
s unnecessary to reach a correct result. Therefore, for the
of this decision, the existence of the hazard is assumed. The
ssue presented here concerns the cited standard: Does it fairly
the hazard perceived by the Secretary? For the reasons which
hold that it does not.

---

er, Raymond Rivera, Climax's occupational health manager at the
eed on cross examination that there is a synergistic relation-
97).

valid application to non-obvious safety or health hazards originating in the mine. The thrust of its claim is that a good faith reading does not fairly suggest any obligation to place warning signs in the mine concerni miners' non-work-related conduct outside the mine.

Much of the specific argument of the parties centers around the relationship between the group of standards which deal specifically with radiation, and the more general standard cited by the Secretary. Climax stresses those cases arising under the Occupational Safety and Health Act which declare that specific standards dealing with a certain subject matt must take precedence over those of a more general application. In the sa vein, Climax argues that by promulgating the discrete body of radiation standards beginning at section 57.5-37, the Secretary has worked a specie of preemption. Operators, that is to say, reading this seemingly comprehensive collection of standards naturally are lead to believe that the need look no further to find all the requirements for radiation protecti Climax further suggests that, other considerations aside, the plain words of the standard, speaking as they do of "barricades" in addition to warni signs, imply that section 57.20-11 was intended to apply solely to definable hazards within the posted or barricaded area. 5/

5/ In a refinement of that argument, counsel for Climax attached to his post-hearing brief an excerpt from the proceedings of the Federal Metal Non-Metal Safety Advisory Committee, which recommended adoption of the regulation in 1975. According to counsel, the comments of committee members show their explicit concern was the protection of miners from non-obvious hazards in underground travelways or mined out areas. The Secretary objects to this post-trial submission as an improper attempt t adduce evidence after the closing of the evidentiary record. While it i probable that the Advisory Committee's proceeding (42 Fed. Reg. 5546, 29 (1977)) is subject to official notice as an aid to interpretation of the standard, I give it no weight because of its content. The hurried discussion of the participants is random and superficial, giving few use ful clues to the true intended scope of the standard.

the most liberal construction consistent with the constraints of
s, however, Climax's arguments must prevail in this caae. I am
ble to conclude that a mine operator, even supposing his know-
he alleged synergistic effect of smoking and radon daughter
could read section 57.20-11 in conjunction with the radiation
and perceive a requirement to post signs in radiation areas of
o warn miners against smoking outside those areas. The stan-
en together, do not fairly convey such a notion to the most
d conscientious operator. This is particularly so for the
reaaons:

The specific radiation standards do not ignore smoking. Section
dresses the matter quite clearly. As mentioned earlier, this
equires simple "no smoking" signs in all mine areaa where
ecords must be kept in compliance with section 57.5-41 (0.3
vels). This implies that the Secretary considered the combined
smoking and radiation exposure, and was satisfied with this mode
ion. Moreover, the Secretary predicatea his case for signs
ainst smoking at home on a 0.1 working level threshold. Such a
ars wholly inconsistent with the 0.3 level specified in sections
d 41. Operators may scarcely be expected to read section
o imply the necessity for more elaborate and intensive warnings
level of exposure than does the specific radiation standard
ks directly to the issue of smoking.

The cited standard identifies no particular hazards. It refers
[a]reaa where health or safety hazards exist that are not im-
obvious to employeea ...." It is specific, however, concerning
batement. It names but two: barricades and warning signs. This
y concerning corrective measures may properly be considered in
g the intended reach of the standard. Assume that a mine
through its own exploration of the scientific and medical data

through such common devices as safety meeting presentations, employee ssfety handbook coversge, or paycheck inserts.

(3) As mentioned earlier, this decision does not purport to deci whether the Secretary correctly identifies and assesses the smoking-radistion hazard. Onc aspect of this issue, however, is mater to efforts to determine the application of the cited standard. The Secretary's expert, Dr. Archer, was commendably frank in acknowledging he was "somewhat arbitrsry" in fingering one-tenth working level as th trigger point for a warning under section 57.20-11. Nowhere does his testimony or any other evidence suggest a general agreement among expe thst this, rsther than some other point, is where the operator's duty should commence. As a regulated party, the operator is entitled to so concrete guidance in the scientific literature, if not the standard it as to the radiation level which poses a danger sufficient to necessita worker warnings. It is likely true, as Dr. Archer suggests, that ther no "safe" radiation level; and that the minimum radiation level requir warning would of necessity be somewhat srbitrsry. The point is, howev that under the regulatory scheme of the Act the Secretary bears the du determining where thst level is, and making it known to mine operators The ad hoc quality of the determination in this case is all too apparent. 6/

Climax did not violate the cited standard. The citations must th fore be vacated.

6/ I do not fault the Secretary for his concern over the hazard which perceives. Much of his evidence on the issue is impressive. I must suggest, however, that his effort to protect against the hazard throug existing standard was misplaced. The lack of a finite threshold radia level for warnings illustrates the need for recourse to the rule makin powers granted by the Act. Use of those powers would provide ample opportunity for a full airing of all data, the making of a decision ba upon that data, and the promulgation of a clear and precise regulation

John A. Carlson
Administrative Law Judge

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SECRETARY OF LABOR,	:	Complaint of Discharge,
MINE SAFETY AND HEALTH	:	Discrimination, or
ADMINISTRATION (MSHA),	:	Interference
on behalf of	:	
Arnold J. Sparks, Jr.,	:	Docket No. WEVA 79-148-D
Complainant	:	
	:	Shannon Branch Coal Mine
v.	:	
	:	
ALLIED CHEMICAL CORPORATION,	:	
Respondent	:	

ORDER REINSTATING DECISION AND ORDER
OF SEPTEMBER 27, 1979

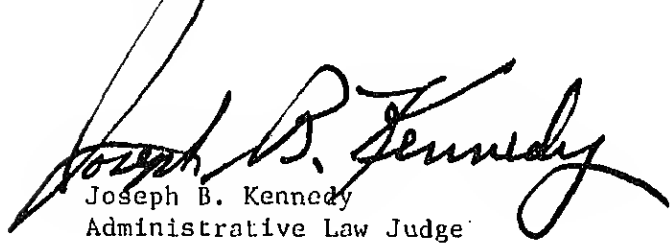
On May 20, 1982, the Commission remanded the captioned matter for "further proceedings consistent with the court's decision" in UMWA v. FMSHRC, 671 F.2d 615 (D.C. Cir. 1982), cert. denied October 12, 1982, _____ U.S. _____.

Accordingly, on July 1, 1982, the trial judge issued an order to show cause why his decision and order of September 27, 1979 should not be reinstated.

Counsel for the Secretary responded saying he had no objection to reinstatement of my finding of discrimination in Allied's refusal to pay walkaround compensation. 1 FMSHRC 1451 (1979). Counsel for the operator suggested reinstatement be stayed pending disposition of a petition for certiorari in Helen Mining et. al. The petition for certiorari was denied on October 12, 1982.

In the meantime the American Electric Power Company through its coal subsidiaries filed contests designed to provoke relitigation of the issue of the applicability of section 103(f) to "spot" inspections Under settled principles of issue preclusion, however, and by the specific terms of the Commission's order of remand, relitigation of th issue in these matters is foreclosed.

The record shows that while its appeal was pending counsel for Allied assured the Commission that all but paragraphs 1, 2 and 6 of my order of September 27, 1979, had been obeyed. Accordingly, it is



Joseph B. Kennedy
Administrative Law Judge

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of Ray Gann and Dennis Gann Complainants	:	Complaint of Discharge Discrimination or Inte Docket No: SE 81-34-DM Young Mine
v.	:	
ASARCO, INCORPORATED, Respondent	:	

DECISION ON CROSS MOTIONS FOR SUMMARY JUDGEMENT

All of the pertinent facts in this discrimination case ha stipulated and the matter has been presented to me on cross mo summary judgement. At the time in question the two complainan classified as production machine men earning $5.43 per hour. production machine men do the work of drilling and blasting th paid an incentive bonus which is based upon the time they were in drilling and blasting and upon the total tonnage broken by in a particular week.

On July 29, 30 and 31, 1980, federal mine inspector Frank inspected respondent's mine. On the first two days he was acc by Mr. Ray Gann for two 8-hour workshifts and on July 31, 1980 Dennis Gann accompanied the inspector for an entire 8-hour wor The two complainants were paid "walkaround pay" at the rate of machine man, and the alleged act of discrimination is they did the incentive bonus that they otherwise would have earned. St VII states:

> "On the days in question all other employees in the machine man classification did drilling and blasting for their entire shifts and received incentive pay i proportion to the number of hours actually worked in classification."

It is therefore clear that it cost each of the complainants a amount of money when they accompanied the inspector during the

"Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection."

t is not necessary to resort to legislative history to determine ach of these two miners did suffer a "loss of pay during the of his participation in the inspection..." There was a violation Act and a citation would have been appropriate. If a citation sued, and I do not know whether one was, then the appropriate penalty should be considered during the normal assessment procedures ted with a citation. Unless and until the Commiasion rules that appropriate to bypass the established assessment procedures, I am ing to assess civil penalties in discrimination cases. If I were ess a civil penalty in this case, however, it would be nominal e the hazard and negligence are of such a low degree.

t is hereby ORDERED that respondent, Asarco, Inc. pay to Dennis he sum of $7.94 */ and pay to Ray Gann the sum of $15.88 and that e paid interest at the rate of 10% beginning on the day when they ly would have received the incentive pay involved herein and uing until payment is made.

Charles C. Moore, Jr.

Charles C. Moore, Jr.,
Administrative Law Judge

bution: By Certified Mail

A. Stewart, Esq., Office of the Solicitor, U.S. Department of 280 U.S. Courthouse, 801 Broadway, Nashville, TN 37203

nnis Gann, Riverbend Road, Mascot, TN 37806

y Gann, Route 3, Park Street, Strawberry Plains, TN 37871

n H. Walters, Mine Superintendent, ASARCO, Inc., Highway 11-E, erry Plains, TN 37871

orporate Systems, 503 Gay Street, Knoxville, TN 37902

ECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
INE SAFETY AND HEALTH	:	
DMINISTRATION (MSHA),	:	Docket No. WEST 82-136-M
Petitioner	:	A.C. No. 48-01181-05040
v.	:	
	:	Sweetwater Uranium Projec
INERALS EXPLORATION COMPANY,	:	
Respondent	:	

DECISION

ppearances: Robert J. Lesnick, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner; Anthony D. Weber, Esq., Los Angeles, California, for Respondent.

efore: Judge Melick

This case is before me upon a petition for assessment of civil pena nder section 105(d) of the Federal Mine Safety and Health Act of 1977, 3 .S.C. section 801, et seq., the "Act", in which the Secretary charges tl inerals Exploration Company with one violation of the mandatory standar C.F.R. § 55.9-3. The cited standard requires that "powered mobile equ ent shall be provided with adequate brakes." The general issues before e whether the company has violated the regulatory standard as alleged he petition and, if so, the appropriate civil penalty to be assessed fo olation.

I have previously determined in connection with violations alleged e identical standard at 30 C.F.R. § 56.9-3, that the regulatory languag oes not provide sufficient guidance es to what is to be considered "ade rakes." 1/ In order to pass constitutional muster, a statute or standa dopted thereunder cannot be "so incomplete, vague, indefinite or uncerta hat men of common intelligence must necessarily guess at its meaning and er as to its application." Connolly v. General Construction Co., 269 U. 85, 391 (1926). Rather, "laws [must] give the person of ordinary intell ence a reasonable opportunity to know what is prohibited, so that he may ccordingly." Grayned v. City of Rockford, 408 U.S. 109, 108-109 (1972). ee Secretary v. Alabama By-Products Corporation, 4 FMSHRC _____ (Decembe 982).

1/ Secretary v. Concrete Materials, Inc., 2 FMSHRC 3105 (1980); Secretar . A.H. Smith, 4 FMSHRC 1371 (1982) rev. grntd. September 3, 1982.

On the unique facts of this case, I cannot conclude that a reasonably
rudent person familiar with the factual circumstances surrounding this all
dly hazardous condition would recognize that there was in fact a hazard wa
anting corrective action within the purview of the cited regulation. This
etermination is based in part upon the failure of MSHA to have followed th
tandardized brake testing procedures approved by industry and accepted by
SHA. According to MSHA inspector Merrill Wolford, brake testing standards
stablished by the Society of Automotive Engineeers (SAE) then existed for
ubber-tired construction equipment such as the Michigan 280 dozer here cit
See Appendix A attached hereto). Wolford conceded that the SAE tests were
he only "recognized" tests, but for reasons not made clear, he devised and
ollowed his own testing procedures in this case which admittedly did not m
he SAE standards. 2/ By devising and using his own ad hoc testing procedu
rocedures not shown to have had scientific validity or reliability, the in
spector was, indeed, exercising completely arbitrary enforcement practices.

The actual tests performed by Wolford, first on the parking brake and
hen on the service brakes, were described by him in the following colloquy

> A. I asked the operator to set the parking brake, to engage the transmission on the vehicle with the engine in idle speed, and then let off of the service brakes, and the vehicle moved forward with no hesitation * * * then I asked the operator -- explained to him what I wanted to do: to have him back up a ways. And while he was doing that, I checked the backup alarm

2/ Wolford testified at one point that it would have been hazardous to hav
followed the SAE tests on the cited machine, but he also testified that he
nevertheless offered to perform those tests for the operator and was prepar
to do so. Wolford subsequently recanted and admitted that he did not in fa
advise the operator that he would perform the SAE tests. I do not find Wol
ford's testimony to be credible in light of these inconsistencies.

at 3 to 5 miles an hour. Q. Now, when you signaled him t
the service brake, what then occurred? A. The vehicle sl
came to a halt -- what I estimated to be in excess of what
would constitute adequate brakes -- approximately 25, 30 f
(T. 14-15).

In light of Inspector Wolford's admission that his own ad
procedures were not the recognized industry and MSHA procedures
ford's testing procedures had no correlation to those recognize
dures and that no evidence has been presented to show that Wolf
ing procedures have any scientific validity or reliability, I c
that a reasonably prudent person would have recognized that the
Michigan 280 loader here cited were inadequate in that they pre
warranting corrective action within the purview of 30 CFR 55.9-
ingly, the operator was denied fair notice of any alleged viola
citation must be vacated.

Even assuming, arguendo, that the apparent partial admissi
supervisor Casey Conway that the parking brakes were indeed bad
3, supra) and that therefore due process problems stemming from
asserted lack of notice may be considered waived, I do not find
ible evidence of record that MSHA has in any event met its burd
that the parking and service brakes on the Michigan 280 loader
were indeed "inadequate". For the reasons previously stated, I
proven testing procedures followed by Inspector Wolford. In an
no weight to Conway's apparent admissions that the parking brak
in light of his testimony that he had no expertise in brake tes
and that indeed he was then confused by the procedures followed

---

3/ Wolford also claims that Casey Conway, the company safety s
mitted after Wolford's testing that the brakes were bad. Ordin
operator has actual knowledge that a cited condition is hazardo
lem of fair notice does not exist. Cape and Vineyard Division
Bedford Gas and Edison Light Company v. OSHRC, 512 F.2d 1148 (1
However, Conway testified, and credibly I believe, that althoug
ally agree with Wolford, he was inexperienced in brake testing
by Wolford's tests and that indeed he subsequently learned in t
his maintenance "people" that Wolford's tests were indeed impro
the circumstances, I do not find Conway's apparent admission to
and, because of his inexperience in the testing of brakes, I wo
sider him to have been a qualified person sufficiently "familia
tual circumstances surrounding the allegedly hazardous conditio
By-Products, supra.

ore and after it was cited, that the brakes were working "real good".
o accord significant weight to the firsthand testimony of field mechan
rge Baker, who drove the cited dozer to the shop after it was cited.
found the brakes to be in "very good" condition and upon inspection,
need for repairs. In addition, inspection documents produced at heari
tressed by the testimony of Conway, show that the cited dozer had been
ted to a "150 hour" inspection, including an inspection for brake adju
t, only the day before the citation herein was issued. I find it unli
the cited dozer would have been returned to service with defective b
er such an inspection.

Finally, I accept as credible the testimony of mine operations super
one Connor that he did not personally believe that the brakes on the c
er were defective and that he agreed to withdraw the dozer to the shop
y to avoid an argument with Inspector Wolford. Under these circumstan
o not consider either Connor's silence in the face of accusations by t
pector or his agreement to withdraw the cited equipment to constitute
sions that either the testing procedures followed by Wolford were prop
that the brakes on the cited equipment were indeed defective. For the
tional reasons, then, I find that the cited standard was not violated
s case and that Citation No. 578809 should be vacated.

ORDER

Citation No. 578809 is hereby vacated and this case is dismissed.

Gary Melick
Assistant Chief Administrative Law Judge

tribution: By certified mail.

hony D. Weber, Esq., Union Oil Company of California, Union Oil Center
7600, Los Angeles, CA 90017

ert J. Lesnick, Esq., Office of the Solicitor, U..S. Department of Lab
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RECOMMENDED PRACTICE
INFORMATION REPORT

J- 1152

This material appears in the SAE Handbook

SAE The Engineering Resource For Advancing Mobility

SAE, 400 COMMONWEALTH DRIVE, WARRENDALE, PA 15096

Technical Committee, approved July 1976, editorial change April 1980. This document incorporates material from SAE J186, e been discontinued. Rationale statement available

rmance criteria for service braking systems, and parking systems for off-highway, rubber- dumpers, tractor scrapers, graders, cranes, ex- orer are provided in this SAE Recommended (July, 1973) and J1116 (July, 1975) (Sections dentification.

braking system performance for in-service ma-

standard.

a by which machine braking system compliance

em—The primary system of any type used for bine.

System—The system used for stopping in the event of any single failure in the service braking system.

3.3 Parking System—A system to hold stopped machine stationary

NOTE: Common Components—The above braking systems may use c mon components. However, a failure of a common component shall *reduce the effectiveness of the machines stopping capability* below the e gency stopping performance as defined in paragraph 4.2.1.

4. Braking System Performance

4.1 Service Braking System—All tractor scrapers and dumpers s have braked wheels on at least one axle of the prime mover and one ax each trailing unit. All other machines shall have at least two braked wh (one right hand and one left hand).

4.1.1 STOPPING PERFORMANCE—The service braking system, when teste accordance with Section 5, shall stop the machine within the distance sp fied in the appropriate table.

4.1.2 HOLDING PERFORMANCE—The service braking system shall have c bility equivalent to holding the machine stationary on a dry swept conc

127 000									
Over 127 000	—	—	—	11.0 (33.0)	15.8 (47.4)	21.3 (63.9)	27.8 (83.4)	35.0 (105.0)	

Brake Performance Requirements (U.S. Customary Units)

Machine Mass, lb	Machine Speed, mph									
	4	6	8	10	12	14	16	18	20	22
	Service Brake Maximum Stopping Distance—Feet (Emergency Brake Maximum Stopping Distance—Feet)									
Up to 36 000	2 (6.0)	5 (15.0)	8 (24.0)	15 (45)	20 (60)	25 (75)	31 (93)	38 (114)	45 (135)	53 (159)
Over 26 000 up to 70 000	—	—	—	19 (57)	25 (75)	33 (99)	41 (123)	51 (153)	61 (183)	72 (216)
Over 70 000 up to 140 000	—	—	—	22 (66)	31 (93)	40 (120)	50 (150)	62 (186)	75 (225)	89 (267)
Over 140 000 to 280 000	—	—	—	26 (78)	36 (108)	47 (141)	60 (180)	74 (222)	89 (267)	107 (321)
Over 280 000	—	—	—	31 (93)	43 (129)	57 (171)	73 (219)	91 (273)	111 (333)	132 (396)

grade under conditions as listed:

Machine	Grade	Condition
Loaders	30%	Loaded to manufacturers gross mass (weight) rating and distribution. Bucket to be in SAE carry position.
Dumpers & Tractor Scrapers	25%	Loaded to manufacturers gross machine mass (weight) rating and distribution.
Graders	30%	Cutting edge to be in the transport position.
Cranes & Excavators	25%	Unloaded, with components in the transport position as recommended by the manufacturer.
Tractors with ed. Dozer	30%	Lowest part of cutting edge to be 460 mm (18 in) above test surface.

The criteria shall apply to both forward and reverse directions.

4.1.3 System Recovery—With the machine stationary, the service braking systems primary power source shall have capability of delivering at least 70% of maximum brake pressure measured at the brakes when the brakes are fully applied twelve (12) times at the rate of four (4) applications per minute with the engine at maximum governed rpm for dumpers, tractor scrapers, cranes and excavators; and twenty (20) times at the rate of six (6) applications per minute with the engine at maximum governed rpm for loaders, graders, and ed. tractors with dozer.

4.1.4 Warning Device—The service braking system using stored energy shall be equipped with a warning device which actuates before system energy drops below 50% of the manufacturers specified level. The device shall be readily visible and/or a provide a continuous warning. Gauges indicating be acceptable to meet these requirements.

4.2 Emergency Stopping System—All mach an emergency stopping system.

4.2.1 Stopping Performance—The emergenc tested in accordance with Section 5, shall stop tances shown in parenthesis in the appropriate

4.2.2 Emergency Application—The emergenc being applied by a person seated in the operato arranged so that it cannot be released from th application unless immediate reapplication can seat to stop the machine or combination of mac

4.2.2.1 In addition to the manual control, the may also be applied automatically. If an aut system is used, the automatic application shall oc is actuated.

4.3 Parking System—All machines shall b system capable of being applied by a person se

4.3.1 Parking System Performance—The par bility equivalent to holding the machine stati concrete grade under all conditions of loading. both forward and reverse directions.

4.3.2 Remain Applied—The parking system w the parking performance in compliance with p contraction of the brake parts, exhaustion of the s any kind.

24	32	40	48
Service Brake Maximum Stopping Distance—Metres (Emergency Brake Maximum Stopping Distance—Metres)			
10.9 (27.1)	17.0 (46.2)	26.5 (70.4)	36.0 (99.5)
14.2 (31.6)	22.3 (52.1)	32.1 (77.7)	43.5 (108.5)
19.2 (38.1)	29.0 (60.9)	40.4 (88.7)	53.5 (121.6)
24.2 (44.9)	35.6 (69.9)	48.8 (99.9)	63.5 (135.0)

Broke Performance Requirements (U.S. Customary Units)

Machine Speed, mph			
15	20	25	30
Service Brake Maximum Stopping Distance—Feet (Emergency Brake Maximum Stopping Distance—Feet)			
36 (90)	59 (153)	88 (234)	122 (330)
47 (105)	74 (173)	106 (258)	144 (360)
64 (126)	96 (202)	134 (294)	177 (403)
80 (149)	118 (231)	161 (331)	210 (448)

riteria

ities and Instrumentation

test course shall consist of a clean swept, level, dry concrete or d surface of adequate length to conduct the test. The approach fficient length, smoothness, and uniformity of grade to assure vel speed of the machine. The braking surface shall not have over he direction of travel, or more than 3% grade at right angles to of travel.

nstrument to measure the stopping distance with an accuracy of

ans to measure the test speed with an accuracy of ±5% of actual

eans for determining the machine mass (weight).

eans for measuring the braking system energy level as required *in* .1.3 and 4.1.1.

eans for measuring the force required by the operator to actuate *ystem*.

Requirements

esrs to be conducted with the applicable braking system fully

oing tests to be conducted under the following conditions:

ine	Condition
	Unloaded, with bucket in SAE carry position

Machine Mass, kg	24	32	40
	Service Brake Maximum Stopping Distance—M (Emergency Brake Maximum Stopping Distance—		
Up to 45 000	10.9 (27.1)	17.9 (46.2)	26.5 (70.4)
Over 45 000 to 90 000	17.6 (36.0)	26.8 (58.1)	37.6 (85.1)
Over 90 000 to 180 000	25.9 (47.1)	37.9 (72.9)	51.5 (103.7)
Over 180 000	37.6 (62.7)	53.4 (93.6)	71.0 (129.6)

Brake Performance Requirements (U.S. Customary Units)

Machine Mass, lb	Machine Speed, mph		
	15	20	25
	Service Brake Maximum Stopping—Fee (Emergency Brake Maximum Stopping Distance		
Up to 100 000	36 (90)	59 (153)	88 (234)
Over 100 000 to 200 000	58 (119)	89 (192)	125 (282)
Over 200 000 to 400 000	86 (156)	125 (241)	171 (344)
Over 400 000	124 (207)	177 (310)	235 (429)

5.2.3 Stopping distance to be measured in metres (feet) from which the brake control is applied to the point at which the stopped.

5.2.4 Stopping tests to be conducted from at least one spe machine as listed:

Machine	Speeds
Loaders, Tractors ed with Dozers	Not less than 26 km/h (16 mph) or ma speed if less than 26 km/h (16 mph).
Dumpers, Tractor Scrapers	Not less than 32 km/h (20 mph) or ma speed if less than 32 km/h (20 mph)
Graders	Not less than 30 km/h (18 mph) or *maximum speed if less than* 30 km/h (18 mph).
Cranes, Excavators	Not less than 32 km/h (20 mph) no m than 48 km/h (30 mph) or maximum s less than 32 km/h (20 mph).

5.2.5 *Stopping test shall be conducted* with the transmission mensurate with the speed required in paragraph 5.2.4. The pow be disengaged prior to completing the stop.

5.2.6 *Auxiliary retarders* shall not be used in the test unless th simultaneously actuated by the applicable brake system control

.2.7 Maximum allowable operator forces to actuate brakin

Appearances:

Mr. Walter Joe Blanc
722 Hemlock Drive, Grand Junction, Colorado 81501
Appearing Pro Se

Peter R. McLain, Esq., Wilson, Brown & Faulk
P.O. Box 4611, Houston, Texas 77210
For the Respondent

Before: Judge John J. Morria

DECISION

Complainant Walter Joe Blanc, (Blanc), brings thia action on hia behalf alleging he waa discriminated againat by his employer, Brown an Root, (B&R), in violation of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

The applicable statutory provision, Section 105(c)(1) of the Act, codified at 30 U.S.C. 815(c)(1), in its pertinent part providea as follows:

> No person shall diacharge or in any other manner diacriminat againat ... or otherwise interfere with the exercise of the statutory rights of any miner ... becauae auch miner ... has filed or made a complaint under or relating to thia Act, including a complaint notifying the operator or the operator'a agent, or the repreaentative of the minera ... of an alleged danger or safety or health violation ... or becauae such min ... has instituted or cauaed to be instituted any proceeding under or related to this Act or has teatified or is about to testify in any auch proceeding, or because of the exercise by auch miner ... on behalf of himself or othera of any atatutory right afforded by thia Act.

ISSUE AND SUMMARY

issue on the merits is whether respondent discriminated against ant, a safety supervisor, in violation of the Act.

evidence is generally without substantial conflicts. Com-'s evidence seeks to prove he was fired because he detected and the abatement of substandard mining practices by Gilbert Western,), a subcontractor. Respondent's evidence seeks to establish a justification for discharging complainant. The proffered ation arises from incidents of unprotected activity.

COMPLAINANT'S EVIDENCE

ter Joe Blanc testified on his own behalf:

was employed by B&R on September 24, 1981 (Tr. 8). Wayne Pierce, a rvisor, offered him the position of safety supervisor at $2400 a r. 9, 12). Pierce also offered Blanc additional employment s (Tr. 9). Blanc had 10 years experience as an MSHA coal mine r (Tr. 13, 14, 16).

nc was, in fact, hired as a safety inspector at $14.50 an hour (Tr. l). After two or three weeks he was told he would not receive the upervisor's position (Tr. 20, 54). Blanc was terminated on 3, 1981 (Tr. 8).

nc's duties included the inspection of the work areas of Tectonic tion, Summit Construction, and Gilbert at the Colony Shale Oil These companies were all subcontractors of B&R, the general or (Tr. 19, 20, 22).

er he started Blanc found explosives and dynamite scattered around ert area (Tr. 22). Prior to this time Blanc detected many unsafe na (Tr. 23, C1). He kept a daily list of these substandard ns which he gave to William Minton, his supervisor, when he was ed (Tr. 24).

ert personnel would become outraged on almost every substandard n Blanc would point out to them (Tr. 25). Blanc discussed such ns with Gilbert supervisors Reseigh, Schnopp, Burkey, or Neff (Tr. least five substandard conditions would be corrected each day (Tr.

er he was terminated Blanc prepared an additional list of these

4. Safety equipment check card not filled out on the triple drill (C1). This was discussed with Reseigh or Schnopp but they didn't too upset (Tr. 29).

5. Battery lid cover loose and unsecured on triple boom dril (C1). This would have been discussed with Gilbert's mechanic, Minton. didn't get upset like the rest of them (Tr. 30).

6. No fire extinguishers on triple and double boom drills, t air compressors, and oil storage station (C1). This condition was discussed with Schnopp (Tr. 30).

7. Inoperative backup alarm on crane (C1).

8. Broken roof glass in crane (C1). This condition and the preceding one were discussed with mechanic Minton who didn't get out of hand (Tr. 30, 31).

9. From October 19, 1981 to November 3, 1981 tagline was not used on suspended equipment (C1). This practice was discussed with Res or Schnopp (Tr. 31). They got upset and aggravated (Tr. 31).

10. October 19, 1981 to November 3, 1981 workmen were observe below suspended load (C1). This practice was discussed with Reseigh or Schnopp (Tr. 31).

11. Paper, aluminum cans, and other trash was scattered throu out the area (C1). Reseigh and Schnopp were not upset over this condit (Tr. 32).

12. The truck carrying explosives: it lacked a cover lid for tonators, it was not identified as one carrying explosives, and it was blocked to prevent motion. Smoking was observed within ten feet of the truck (C1). This was discussed with Reseigh. He was angry and upset took care of it right away (Tr. 32).

14. No smoking signs were not placed on the truck carrying iesel fuel (C1). This was discussed with Schnopp or Bill Milton mechanic)(Tr. 33). Blanc didn't think this was abated (Tr. 33).

15. Diesel fuel was stored in two 5 gallon containers (C1). Blanc discussed this with Schnopp but couldn't recall his reaction (Tr. 33).

16. A backhoe and front end loader were taken into the tunne without emissions control for the diesel exhaust (C1). This situation discussed with Reseigh or Schnopp who tried to convince Blanc that the equipment had emissions controls (Tr. 33).

17. The lunchroom was cluttered with tin cans and paper tras C1). This condition was discussed with Schnopp who didn't seem to get pset (Tr. 34).

18. The roof in the tunnel was not supported in an area abou ix feet wide and ten feet in length (C1). Blanc discussed this with eseigh who became outraged. Blanc had a copy of the ground support pl eseigh through up his hands, replied with an obscenity, and left the roperty like a wild man (Tr. 34, 43). Schnopp with whom Blanc also iscussed this was upset because they'd have to put in ground support (4). The roof support incident happened the same day Blanc was termina Tr. 43, 61).

In the three and one half weeks Blanc was on the Gilbert site the onditions not abated were the roof support problem [No. 18] and the br lass in the crane [No. 8] (Tr. 60). Blanc didn't know if the roof upports were installed since this incident occurred on the day of his ermination (Tr. 61).

Minton terminated Blanc on November 3, 1981 between noon and 3 p.m Tr. 35). Minton said he was terminating Blanc for his failure to get long with the contractor. Minton said he couldn't go around "putting ires" (Tr. 30). At this meeting no statements were made about Blanc's afety complaints issued against Gilbert nor was there any discussion a lanc's job activities (Tr. 38, 40, 41). At the termination conference ohon said Blanc was in his hair and he (Hohon) had only been there a w Tr. 41).

On two prior occasions Blanc's supervisor, Minton, had told him to ake it easy on Gilbert because they had a hard money contract (Tr. 41- ard money, according to Blanc, means they don't want any slowdown (Tr.

he'd stop the van, get out, and take care of the situation (Tr. 62). T
that Blanc meant he was going to "knock him on his ass" (Tr. 62-63). T
was not Blanc's normal approach to problems although he did get upset w
safety director Dave Allen over a flagrant violation (Tr. 63).

On another occasion, after the van incident, Blanc noticed part of
lunch was missing from his lunchbox. Blanc didn't say anything until h
checked with his wife (Tr. 65). The next morning he held his only safe
meeting. At the meeting he told the Gilbert employees that whoever got
into his lunchbox would need an ambulance, i.e., Blanc was going to "kn
them on their ass" (Tr. 65, 66).

RESPONDENT'S EVIDENCE

Respondent's witnesses were William Minton (B&R safety director),
Walter Saunders (Blanc's immediate supervisor), Gary Bates (Exxon's min
superintendent and client's representative), and Bob Reseigh (Gilbert
project manager).

Witness William Minton testified as follows:

As B&R's safety director, he was responsible for safety and health
Colony Shale Oil Project (Tr. 94, 95). Blanc was responsible for the
bench area (Tr. 96). Blanc was hired as a safety inspector at $14.50
hour because of his knowledge about MSHA and mining practices (Tr. 106)

Minton explained to Blanc that he shouldn't shut down Gilbert for
non-serious violations (Tr. 111). B&R could be back charged for this a
It would affect productivity (Tr. 111). Blanc was counselled on two
different occasions because of complaints by Reseigh (Gilbert project
manager) and Gary Bates (Exxon manager) (Tr. 111).

Minton first heard about the middle of October from Vance English
Gilbert was being shut down for improperly marked gas cans and for work
being on top of a trailer (Tr. 112, 113). Minton went up to the mounta
nd didn't see anything that would cause a shutdown (Tr. 113-114).

It is B&R policy that if a safety inspector sees employees in a
situation of imminent danger he has the authority to shut down the
operation (Tr. 115). Various remedies are available to the inspector (
116-117). Minton did nothing about this particular complaint (Tr.
117-118).

It was over two weeks later when Reseigh came to Minton and said t
were being harasaed by Blanc and shut down for no reason at all (Tr. 11
119). Minton's investigation showed no hi e serious that should caus

anc, Bills, and Reseigh were talking. Bills brushed against Blanc omatically took offense. He put his fists up and told Bills he never touch him again (Tr. 122). Minton talked to Bills and , but not Blanc, about this incident (Tr. 123).

out November 3 Gates came to Minton about a shutdown (Tr. 124-125). felt Blanc was abusing his authority as an inspector (Tr. 125).

his termination meeting Minton told Blanc he had no alternative but inate him for failure to get along with the subcontractor (Tr. 125). as quiet. He did not deny the lunchbox, the van, and the Bills ts (Tr. 125). Blanc's discharge slip reads that he was fired for to get along with the subcontractor (Tr. 145-146).

nton's first counselling session with Blanc was after Reseigh ned about Blanc shutting Gilbert down. The second session was over urs Blanc was to work. The fourth session was after the Bills t. This was on the date of termination (Tr. 128). There were five ling sessions before Blanc was terminated (Tr. 129). The fifth and ession was on the day Blanc was fired (Tr. 129). Minton never ned Blanc's job nor did he at any time tell him not to note or violations or defects (Tr. 129, 133-134).

nton learned of the incident involving roof supports in the tunnel mber 3 after Blanc had been terminated (Tr. 135). Bates and Reseigh Parachute (Colorado), after Blanc had left, and explained they had additional bolts (Tr. 135). Reseigh said this was not an imminent situation although bolts were required in the drawings (Tr. 135). adn't talked about the bolts at the termination meeting (Tr. 135). o Blanc being terminated Minton didn't have any knowledge of the conditions for which Gilbert was cited (Tr. 158-159).

anc never told Minton he was having problems with the sub- tors (Tr. 161).

anc's termination on November 3, 1981 was triggered by the nts of the subcontractor, the client, and the [disregard by Blanc of unselling sessions. The final straw was the lunchbox incident (Tr.

tness Walter Saunders testified as follows:

was Blanc's supervisor (Tr. 163). Saunders returned from leave ctober 26. At that time Minton informed him that there were some s on the mine bench. Some animosity had developed between Gilbert

Dave Allen's complaints were that Blanc was either shutting down the operation or threatening to do so when it wasn't justified (Tr. 177).

Blanc was terminated because of his inability to talk with sub-contractors and because he was abrasive (Tr. 179, 180). It is improper f an inspector to threaten someone with bodily harm (Tr. 182).

Witness Gary Bates testified as follows:

He was the representative for Exxon USA, and as such he was responsible for the day to day operation of the Colony Shale Oil Project (Tr. 184).

Joe Blanc first came to Bates' attention shortly after Gilbert mobilized (Tr. 188). A series of statements were made to Bates which he considered to be overzealousness on Blanc's part (Tr. 189). It was not much what Blanc said but how he stated it (Tr. 189). Blanc was using abusive language and a tough guy attitude (Tr. 190). Bates asked Minton straighten this out (Tr. 190).

About a week later the Bills incident (when Bills brushed against Blanc) was brought to Bates' attention (Tr. 191). Bates contacted Minto because he was concerned about a fight (Tr. 191). Minton told Bates he' talk to Blanc (Tr. 191).

Another matter brought to Bates' attention was the lunchbox incident which Bates describes as Blanc "lining up" the Reseigh group and saying he'd send them off the hill in an ambulance if it happened again (Tr. 19 Bates told Minton this conduct is "completely unacceptable and we can't have that" (Tr. 192). Minton said he'd look into it and try to get it resolved (Tr. 192).

Bates never made any recommendation concerning Blanc's personnel status (Tr. 192).

(Tr. 214-215). Gilbert had a fixed price contract where Gilbert was pa
in lineal feet of tunnel (Tr. 213).

Reseigh and Blanc disagreed over the way things should be done. B
would note violations and bring them to Reseigh's attention (Tr. 214, 2
Basically Blanc wanted it corrected now (Tr. 215). It was Gilbert's po
to correct, if possible (Tr. 215).

On several occasions Blanc shutdown several pieces of equipment fo
not having fire suppressors. MSHA did not require such suppressors (Tr
215-217). Reseigh complained to Bates (Tr. 216-217).

About a week or 10 days later they were about 40 to 50 feet into t
access tunnel (Tr. 219). Blanc wanted ventilation. Reseigh hestitated
because subsequent blasting would blow it up (Tr. 219). Reseigh went t
ates and told him they could legally advance 100 feet (Tr. 219). Bate
agreed. Reseigh didn't know if Blanc had shut down the tunnel (Tr. 219

Blanc called a safety meeting and threatened to carry some people
of the mountain because a sandwich was missing from his lunchbox. Rese
told Saunders about it. Reseigh felt they couldn't have that kind of
animosity on the site (Tr. 220).

On one occasion [November 3] Blanc said Gilbert couldn't drill. Th
plan called for rock bolts in back of the rib (Tr. 221). Normally such
bolts are installed behind the Jumbo (Tr. 222). The Jumbo was pulled o
buck brought in, and Gilbert installed the roof bolts (Tr. 222). Rese
went down and talked to Bates and after lunch they both went to Minton
Parachute, some 16 to 20 miles from the job site (Tr. 222).

Reseigh said something had to be done about Blanc (Tr. 222-223).
was told that something had been done (Tr. 222-223).

Reseigh's workers were instructed to get along with Blanc (Tr.
23-224).

On one occasion Bills was talking with his hands and he touched Bla
ho got "stiff". Blanc told Bills not to touch him again, that he did
ike to be touched. He was not belligerent but there was no question he
idn't want to be touched (Tr. 226-227). Bills is 5 foot, 7 inches tall
nd 68 to 75 years old (Tr. 227). [At the hearing the Judge observed tha
lanc appears taller and younger than Bills].

On one occasion Blanc wanted all work to cease in the tunnel face
uring blasting operations (Tr. 230). When Gilbert blasts in s tunnel t

Reseigh only complained twice about Blanc. The first instance was that Blanc was inspecting them unnecessarily for trivial problems. On t day Blanc was no longer assigned to the mine bench Reseigh wanted to be sure the problem had been taken care of so he went to see Minton (Tr. 24

DISCUSSION

The Commission established the general principles for analyzing discrimination cases under the Mine Act in Secretary ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom, Consolidation Coal Co. v. Marshall, 663 F 2d 1211, (3d Cir. 1981), and Secretary ex rel Robinette v. United Castle Coal Co. FMSHRC 803 (April 1981). In these cases the Commission ruled that a complainant, in order to establish a prima facie case of discrimination bears a burden of production and persuasion to show that he was engaged protected activity and that the adverse action was motivated in any part the protected activity. Pasula 2 FMSHRC 2799-2800; Robinette, 3 FMSHRC 817-818.

At this point it is appropriate to consider the status of Blanc's activities. The vast majority of discrimination claims arising under th Act are generated by miners engaged in duties other than those of a safe inspector. I find nothing in the text of the Act or in the legislative history that indicates Congress intended to exclude a safety inspector from the protection of the discrimination portion of the Act. An operator's safety inspector bears an important function in helping fulfi the purposes of the Act since his duties will ordinarily seek to promote safety and health. Under Pasula and Robinette and their progeny I concl that good faith complaints of unsafe and unhealthy conditions by a safet inspector in the ordinary course of his duties are protected under the Act.

Having resolved Blanc's status we will go to the Commission's furth ruling in Robinette: to rebut a prima facie case a operator must show either that no protected activity occurred (in view of the ruling as to Blanc's status B&R cannot establish that defense) or that the adverse action was in no part motivated by protected activity, 3 FMSHRC 817-818 N. 20. If an operator cannot rebut the prima facie case in the foregoi manner it may nevertheless defend by proving that it was also motivated the miner's unprotected activities and that it would have taken the adve action in any event for the unprotected activities alone, Pasula, 2 FMSH 2799-2800.

perator's alleged business justification for the
allenged adverse action. In appropriate cases, they may
nclude that the justification is so weak, so implausible,
so out of line with normal practice that it was a mere
retext seized upon to cloak discriminatory motive. But such
quiries must be restrained.
e Commission and its judges have neither the statutory
arter nor the specialized expertise to sit as a super
ievance or arbitration board meting out industrial
uity. Cf. Youngstown Mines Corp., 1 FMSHRC 990, 994 (1979).
ce it appears that a proffered business justification is
t plainly incredible or implausible, a finding of pretext
inappropriate. We and our judges should not substitute
r the operator's business judgment our views on "good"
siness practice or on whether a particular adverse action
s "just" or "wise." Cf. NLRB v. Eastern Smelting & Refining
rp., 598 F. 2d 666, 671 (1st Cir. 1979). The proper focus,
rsuant to Pasula, is on whether a credible justification
gured into motivation and, if it did, whether it would have
d to the adverse action apart from the miner's protected
tivities. If a proffered justification survives pretext
alysis ..., then a limited examination of its substantiality
omes appropriate. The question, however, is not whether
h a justification comports with a judge's or our sense of
irness or enlightened business practice. Rather, the
row statutory question is whether the reason was enough
have legitimately moved that operator to have disciplined
e miner. Cf. R-W Service System Inc., 243 NLRB 1202, 1203-
(1979) (articulating an analogous standard).

C at 2516-17. Thus, the Commission first approved restrained
an operator's proffered business justification to determine
mounts to a pretext. Second, the Commission held that once it
d that a business justification is not pretextual, then the

approved once offered. Rather, the Commission [illegible] carefuly analyzing such defenses, should not substitute his business judgment or sense of "industrial justice" for that of the operator. As Commission recently stated "our function is not to pass on the wisdom or fairness of such asserted business justifications but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed." Bradley v. Belva Coal Co 4 FMSHRC 982, 993 (June 1982).

With the Commission directives in mind we will examine the defense asserted by B&R. The defenses are succinctly stated by Blanc's supervis Minton. Blanc was terminated because of complaints by the subcontractor (Gilbert), the client (Exxon), and the counselling sessions. The final straw was the lunchbox incident (Tr. 159). B&R in its post trial brief also argues that the Bills and the van incidents support B&R's business justifications.

We will examine the record. Gilbert's complaints: Manager Reseigh complained twice. Once was over being unnecessarily inspected over triv problems (Tr. 247). The second time was apparently when Reseigh went to see Minton himself (Tr. 247). At that point Blanc had already been terminated.

The client's complaints: Exxon, through its manager Gary Bates, ask Minton to "straighten out" Blanc's attitude. Bates dislikes an attitude of "I am not here to help your safety program, I'm here to shut you dow (Tr. 190).

Further complaints by the client arose from the Bills incident. Ba was concerned about a fight and again contacted Minton (Tr. 191).

Bates describes the lunchbox incident as Blanc "lining up" Reseigh' group (Tr. 192). Bates admonished Minton stating "that type of behavio completely unacceptable and we can't have that" (Tr. 192).

Three complaints by a client-owner in less than a three week perio would motivate Minton to fire Blanc. A miner's unsatisfactory past wor record is one of the criteria discussed in Bradley v. Belva Coal Company

On the basis of the Commission directives I conclude that the busi justification is not pretextual and the reasons were enough to have legitimately moved B&R to take adverse action against Blanc.

I have carefully examined Blanc's evidence. A cursory review migh indicate that his facts establish a claim of retaliatory conduct. The scenario: Blanc has been overzealous in enforcing safety regulations

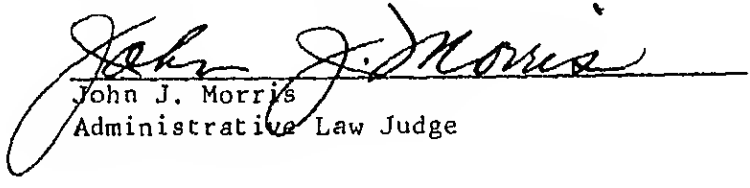
Minton generally did not know about Blanc's disagreement over
ditions with Gilbert personnel nor about the roof bolt incident
ors could not have motivated Minton to fire Blanc.

the evidence fails to establish a case of discriminatory conduct
on of the Act it is unnecessary to consider Blanc's claim of lost
expenses.

on the foregoing facts and conlusions of law I enter the

ORDER

omplaint of discrimination is dismissed.



John J. Morris
Administrative Law Judge

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